The Dimensions of Seizure: The Concepts of "Stop" and "Arrest"

RICHARD A. WILLIAMSON*

I. INTRODUCTION

There is, perhaps, no aspect of criminal jurisprudence more important than that which governs the decision to deprive an individual of his or her freedom of movement prior to adjudication of guilt or innocence.[1] The framers of the Bill of Rights understandably sought to limit and control the circumstances under which the government could take a person suspected of criminal activity into custody. The decision to restrict freedom of movement, whether in the form of the familiar "arrest" of a person suspected of committing a crime or in the form of a temporary forcible detention for purposes of questioning or investigation, is governed by the fourth amendment's guarantee of the "right of the people to be secure in their persons . . . against unreasonable searches and seizures . . . ."[2]

Surprisingly, the development of the law governing seizures of people has been the stepchild of fourth amendment jurisprudence. During the past two decades especially, the Supreme Court has been preoccupied with the task of defining the nature and scope of the individual privacy right secured by the amendment.[3] The nature and scope of the limitations on the right of the

---

* Associate Dean and Professor of Law, College of William and Mary, Marshall-Wythe School of Law. B.B.A., Ohio University, 1965; J.D., Ohio State University College of Law, 1968.

1. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 47. *See also* United States v. Watson, 423 U.S. 411, 428 (1976) (Powell, J., concurring).

The initial decision to deprive or restrict freedom of movement prior to adjudication of guilt or innocence must be distinguished from the related question of the legality of pretrial restraints once a determination has been made that the initial deprivation was lawful. When an individual has been lawfully taken into custody and charged with a crime, the right of a government to impose pretrial restraints designed to ensure his or her presence at trial is firmly established. Stack v. Boyle, 342 U.S. 1, 4–5 (1951); U.S. CONST. amend. VIII; *cf.* Gerstein v. Pugh, 420 U.S. 103 (1975) (before extended pretrial restraints may be imposed there must be a judicial determination of probable cause to believe that the person committed a crime). *See generally* Thaler, *Punishing the Innocent: The Need for Due Process and the Presumption of Innocence Prior to Trial*, 1978 WIS. L. REV. 441; Wald, *Pretrial Detention and Ultimate Freedom: A Statistical Study*, 39 N.Y.U.L. REV. 631 (1964).

2. U.S. CONST. amend. IV, which reads in full as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

3. Although this is not an exhaustive listing, serious students of the fourth amendment will recognize such leading search cases as United States v. Ross, 102 S. Ct. 2157 (1982); New York v. Belton, 453 U.S. 454 (1981); Robbins v. California, 453 U.S. 420 (1981); Steagald v. United States, 451 U.S. 204 (1981); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); Payton v. New York, 445 U.S. 573 (1980); Arkansas v. Sanders, 442 U.S. 753 (1979); Rakas v. Illinois, 439 U.S. 128 (1978); Zurcher v. Stanford Daily, 436 U.S. 547 (1978); United States v. Chadwick, 433 U.S. 1 (1977); South Dakota v. Opperman, 428 U.S. 364 (1976); United States v. Robinson, 414 U.S. 218 (1973); Schneckloth v. Bustamonte, 412 U.S. 218 (1973); United States v. Dionisio, 410 U.S. 1 (1973); Coolidge v. New Hampshire, 403 U.S. 443 (1971); Chambers v. Maroney, 399 U.S. 42 (1970); Chimel v. California, 395 U.S. 752 (1969); Spinelli v. United States, 393 U.S. 410 (1969); Katz v. United States, 389 U.S. 347 (1967); Camara v. Municipal Court, 387 U.S. 523 (1967); Mapp v.

government to restrict individual freedom of movement is the last great unexplored area of the fourth amendment. In short order the Supreme Court has decided a number of cases that have concerned seizures of people in a variety of situations. Although all the problems have not been resolved yet, as the discussion that follows demonstrates, the Court's recent efforts have clarified much of the uncertainty regarding the nature and scope of the amendment's protections in the context of preadjudication seizures of people.

The belatedness of the Court's efforts in this area is understandable. The exclusionary rule has been the principal mechanism for judicial enforcement of fourth amendment rights.[4] During the past twenty years the Supreme Court has promulgated numerous rules limiting the use of evidence obtained in violation of the constitutional rights of the accused.[5] If the alleged constitutional violation produced no evidence used directly or indirectly at trial, or if no prosecution followed, the pressures to define the limits of the challenged government activity would not be present. In the case of an unconstitutional seizure of an individual, the only direct adjudicatory consequence flowing from the illegal activity would be the physical presence of the accused in court. The Supreme Court has long adhered to the position that the unlawful seizure of an accused, standing alone, presents no bar to prosecution and

---

Ohio, 367 U.S. 643 (1961). For an excellent treatment of the development of fourth amendment law during the past two decades, see Saltzburg, *Foreword: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69 GEO. L.J. 151 (1980). *See also* Yackle, *The Burger Court and the Fourth Amendment*, 26 U. KAN. L. REV. 335 (1978).

4. Weeks v. United States, 232 U.S. 383 (1914). The rule was made applicable to the states by Mapp v. Ohio, 367 U.S. 643 (1961). For an excellent discussion of the justification for the rule and the problems it presents, see Kamisar, *Is the Exclusionary Rule an "Illogical" or "Unnatural" Interpretation of the Fourth Amendment?*, 62 JUDICATURE 66 (1978); Kamisar, *The Exclusionary Rule in Historical Perspective: The Struggle to Make the Fourth Amendment More than an "Empty Blessing,"* 62 JUDICATURE 337 (1979); Wilkey, *A Call for Alternatives to the Exclusionary Rule: Let Congress and the Trial Courts Speak*, 62 JUDICATURE 351 (1979); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 214 (1978).

5. The number of exclusionary rule cases—cases in which suppression was argued as a consequence of alleged fourth amendment violations—is legion. In most of these cases the controversy did not concern direct challenges to the exclusionary rule as an appropriate remedy; instead, the focus of the arguments was the substance of the alleged fourth amendment violation. Recently, however, a number of cases have arisen in which questions have been raised concerning the exclusionary rule as an appropriate remedy for an assumed fourth amendment violation. In some of these cases the challenge to the exclusionary rule has been direct and in the context of a controversy over the suppression of the direct fruits of an unlawful search. *See* Rakas v. Illinois, 439 U.S. 128, 130 (1978) (Powell, J., concurring); Stone v. Powell, 428 U.S. 465, 498–500 (1976) (Burger, C.J., concurring). In other cases the challenge to the exclusionary rule has been in the context of attempts to suppress the indirect fruits of an illegal search or seizure. *See* United States v. Ceccolini, 453 U.S. 268 (1978).

The Supreme Court also has recognized limits on the exclusionary rule depending on the forum or procedural context in which it is urged. *See* United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976); and United States v. Calandra, 414 U.S. 338 (1974).

The most recent challenge to the exclusionary rule has been an attempt to remove applicability of the rule from cases entailing good faith conduct by the police. The well-publicized case of United States v. Williams, 622 F.2d 830 (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), represents one of the most recent judicial attempts to establish a good faith exception to the exclusionary rule. *See also* Stone v. Powell, 428 U.S. 465, 501–02 (1976) (Burger, C.J., concurring). The good faith exception has been criticized. *See generally* LaFave, *The Fourth Amendment in an Imperfect World: On "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307 (1982); Comment, *Exclusionary Rule: Good Faith Exception—The Fifth Circuit's Approach in* United States v. Williams, 15 GA. L. REV. 487 (1981). For a discussion of a variation on the good faith standard, see Burkoff, *Bad Faith Searches*, 33 N.Y.U. L. REV. 70 (1982).

conviction.[6] In addition, many instances exist in which an unlawful seizure will not be followed by prosecution. Hence, a defendant will have no opportunity, other than by way of a civil suit against the offending officials, to challenge the legality of a seizure.[7]

The collateral consequences of unlawful seizures have been substantial, however, and undoubtedly have contributed to the pressures to clarify the constitutional doctrines applicable to the seizure process. Under existing fourth amendment doctrine the government may, without a warrant and in the absence of probable cause, search the person of an arrestee and the area within his or her immediate control.[8] The constitutional predicate for the right to search incident to arrest is a lawful arrest.[9] If the arrest does not satisfy fourth amendment standards, the "derivative evidence" component of the exclusionary rule requires the suppression of tangible evidence obtained in the search.[10] Likewise, a seizure of an individual may provide the opportunity

---

6. *See, e.g.*, United States v. Crews, 445 U.S. 463, 474 (1980); Gerstein v. Pugh, 420 U.S. 103, 119 (1975); Frisbie v. Collins, 342 U.S. 519 (1952); Ker v. Illinois, 119 U.S. 436 (1886). In *Frisbie* the defendant was forcibly removed from his Chicago home by Michigan law enforcement officials and taken back to Michigan for prosecution. The Court stated that it had never "departed from the rule announced in [*Ker*], that the power of a court to try a person . . . is not impaired by the fact that he had been brought within the court's jurisdiction by reason of a forcible abduction." 342 U.S. 519, 522 (1952). *See also* United States v. Gengler, 510 F.2d 62 (2d Cir. 1975), *cert. denied sub nom.* Lujan v. Gengler, 421 U.S. 1001 (1975); United States v. Cotten, 471 F.2d 744 (9th Cir.), *cert. denied*, 411 U.S. 936 (1973). *But see* United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974).

7. A civil action for damages against state officials under 42 U.S.C. § 1983 is possible, Monroe v. Pape, 365 U.S. 167 (1961), but the officials will enjoy a good faith defense, Pierson v. Ray, 386 U.S. 547 (1967). *See also* Gomez v. Toledo, 446 U.S. 635 (1980). In certain circumstances a suit for damages may be asserted against a local government, Monell v. New York City Dep't of Social Servs., 436 U.S. 658 (1978), and the city may not have a good faith defense, Owens v. City of Independence, Mo., 445 U.S. 622 (1980). A similar cause of action for damages may be asserted against federal law enforcement officials. Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971). Once an individual litigates and loses the fourth amendment claim in the criminal prosecution, however, the principle of collateral estoppel will bar relitigation of the claim in a civil suit against the offending officials. Allen v. McCurry, 449 U.S. 90 (1980).

8. Chimel v. California, 395 U.S. 752 (1969). *See also* Michigan v. DeFillippo, 443 U.S. 31 (1979); United States v. Edwards, 415 U.S. 800 (1974); United States v. Robinson, 414 U.S. 218 (1973). *But see* New York v. Belton, 453 U.S. 454 (1981) (extending the right to search to the entire interior of an automobile).

9. Chimel v. California, 395 U.S. 752 (1969). The statement that the right to search incident to arrest is predicated in the first instance on a lawful arrest is misleading. The actual time sequence of the search and the formal arrest apparently is inconsequential if they are substantially contemporaneous. *See, e.g.*, Stoner v. California, 376 U.S. 483 (1964); Italiano v. Commonwealth, 214 Va. 334, 200 S.E.2d 526 (1973). The Court clearly has held, however, that the evidence or information obtained through the search incident to arrest may not be used to justify the arrest retroactively. United States v. Henry, 361 U.S. 98 (1959).

10. Michigan v. DeFillippo, 443 U.S. 31 (1979). The issue of the admissibility of evidence directly seized pursuant to a search incident to arrest normally is not viewed as a derivative evidence or fruit-of-the-poisonous-tree problem. Instead, it commonly is viewed as an illegal search in itself. Although the outcome is the same no matter how the problem is articulated, to view it as a fruit-of-the-poisonous-tree problem arguably is more accurate, the poisonous tree being the illegal arrest.

The statement that if the arrest falls short of meeting fourth amendment standards it is unlawful and evidence seized pursuant to a search incident thereto must be suppressed is accurate to some extent. An arrest, however, may be unlawful for other reasons that have nothing to do with the fourth amendment. For example, an arrest may be unlawful under state law requiring an arrest warrant, especially in misdemeanor cases. *See, e.g.*, VA. CODE § 19.2-81 (Supp. 1982). Whether the exclusionary rule should bar the admissibility of evidence seized pursuant to an unlawful arrest under state law is unclear. *Cf.* Street v. Surdyka, 492 F.2d 368, 371 (4th Cir. 1974).

Another variation on the problem was presented in Michigan v. DeFillippo, 443 U.S. 31 (1979). In *DeFillippo* the Court held that a search incident to arrest made with probable cause could not be invalidated by challenging the constitutionality of the substantive criminal statute under which the arrest was made. Thus, even

to question the person and obtain incriminating statements for use at trial,[11] to obtain information leading to the discovery of other evidence, including evidence sufficient to constitute probable cause to arrest,[12] to obtain fingerprints or other incriminating evidence relating to the personal characteristics of the accused,[13] or to provide for witnesses to view the suspect for identification purposes.[14] A seizure of a suspected criminal, in other words, may not only serve the utilitarian function of making criminal prosecution possible by providing a body in court against whom to prosecute the case; it also may enhance investigatory goals by providing the opportunity to obtain evidence. If the seizure that produces the opportunity to obtain the incriminating evidence is constitutionally infirm, the derivative evidence concept should preclude in most instances the use of evidence thereby obtained.[15]

The consequences to the individual of a governmental seizure prior to adjudication of guilt or innocence are likewise substantial, although more difficult to quantify. The individual whose freedom of movement has been restricted incurs more than a "petty indignity."[16] This person suffers the humiliation of being taken into custody; he or she may be fingerprinted, photographed, and detained for at least the time necessary to arrange for bail, and may acquire an arrest record that will remain for the rest of his or her life.[17] If the restrictions are prolonged, they may imperil a job, interrupt one's source of income, and impair family relationships.[18]

---

if the substantive statute is invalidated on the merits, rendering the arrest unlawful (at least in a technical sense), the fruits of the search undertaken before the statute was invalidated would be admissible in a prosecution for violation of another valid statute.

11. *See* Taylor v. Alabama, 102 S. Ct. 2664 (1982); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975).

12. *See* United States v. Mendenhall, 446 U.S. 544 (1980).

13. *See* Cupp v. Murphy, 412 U.S. 291 (1973) (scrapings from the defendant's fingernails); United States v. Dionisio, 410 U.S. 1 (1973) (voice exemplars); Davis v. Mississippi, 394 U.S. 721 (1969) (fingerprints); Schmerber v. California, 384 U.S. 757 (1966) (blood samples); *cf.* Taylor v. Alabama, 102 S. Ct. 2664 (1982) (fingerprints).

14. *See* United States v. Crews, 445 U.S. 463 (1980).

15. The derivative evidence or fruit-of-the-poisonous-tree doctrine was applied first in Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920). Justice Holmes' description of the concept and the limits of its use remains instructive:

> The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

Id. at 392.

Not all evidence is a fruit of the poisonous tree just because it would not have been discovered but for the primary illegality. The test is "whether, granting the establishment of the primary illegality the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Wong Sun v. United States, 371 U.S. 471, 488 (1963) (quoting J. MAGUIRE, EVIDENCE OF GUILT 221 (1959)).

Two recent decisions of the Supreme Court indicate that there are limits to how far the doctrine can be extended. *See* United States v. Crews, 445 U.S. 463, 470–74 (1980); and United States v. Ceccolini, 435 U.S. 268, 273–79 (1978).

16. Terry v. Ohio, 392 U.S. 1, 17 (1968).

17. Barrett, *Personal Rights, Property Rights, and the Fourth Amendment*, 1960 SUP. CT. REV. 46, 47.

18. Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

Given the significant personal consequences that follow a seizure and, in the event of prosecution, the potential collateral evidentiary concerns, the need for greater emphasis on controlling principles has been substantial. During the past six years the Supreme Court has decided cases that (1) defined the role of the warrant process in the decision to restrict freedom of movement;[19] (2) further limited the use of temporary investigative detentions;[20] (3) reaffirmed and clarified the authority of the government to "control" the actions of persons lawfully seized;[21] (4) reaffirmed and clarified the standards by which a court judges the factual quantum and quality of information that is necessary under the fourth amendment to support a seizure of an individual;[22] and (5) determined that the derivative evidence component of the exclusionary rule, although still viable in situations concerning the illegal seizure of an individual, is not unlimited.[23] Although the Supreme Court has resolved many

---

19. The Supreme Court has held that the fourth amendment does not require that the police first secure an arrest warrant before making an arrest in a public place for a felony. United States v. Watson, 423 U.S. 411 (1976). The Court also has held, however, that if extended restrictions on liberty are imposed following arrest, the government must promptly submit the information constituting probable cause for arrest to a review by an independent magistrate. Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

20. Dunaway v. New York, 442 U.S. 200 (1979). *See infra* text accompanying notes 195–201.

21. Michigan v. Summers, 452 U.S. 692 (1981). *See infra* text accompanying notes 219–21. In Ybarra v. Illinois, 444 U.S. 85 (1979), the Supreme Court held that patrons on public premises which were to be searched under the authority of a search warrant could not be frisked or searched merely because of propinquity to others suspected of criminal activity. In Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam), the Court upheld the right of a police officer to order the driver of an automobile to alight following a traffic stop. *See infra* text accompanying notes 223–24. *See generally* Comment, *Orders to Alight: Opening the Door to a New Traffic Stop Search and Seizure Rule*, 15 U.C.D. L. REV. 171 (1981).

22. *See* Michigan v. Summers, 452 U.S. 692 (1981); United States v. Cortez, 449 U.S. 411 (1981); Reid v. Georgia, 448 U.S. 438 (1980); United States v. Mendenhall, 446 U.S. 544 (1980); Brown v. Texas, 443 U.S. 47 (1979); Dunaway v. New York, 442 U.S. 200 (1979); Delaware v. Prouse, 440 U.S. 648 (1979). *Dunaway* confirmed the concept of probable cause as the standard that must be met to justify an arrest of a suspect. 442 U.S. 200, 216 (1979). The remaining cases deal with the concept of reasonable suspicion as the standard that must be met to justify the less intrusive form of seizure, often referred to as a stop. *Cortez* held that the reasonable suspicion standard must be evaluated by the "totality of the circumstances—the whole picture" confronting the police, but that the detaining officer "must have a particularized and objective basis for suspecting the particular person stopped of criminal activity." 449 U.S. 411, 417 (1981). *Cortez* also held that the police could consider "modes or patterns of operation of certain kinds of lawbreakers" although inferences of criminal activity drawn from such conduct "might well elude an untrained person." *Id.*

Summers held that the requisite reasonable suspicion for detaining an occupant of a dwelling that is about to be searched under a warrant could be found in the mere connection of the occupant to the home. 452 U.S. 692, 703–04 (1981). *See infra* text accompanying note 227. *Brown*, on the other hand, held that a person's presence in a neighborhood frequented by drug users was not sufficient to support a conclusion that he was engaged in criminal conduct. 443 U.S. 47, 52 (1979). *See infra* text accompanying notes 81–82.

Reid and *Mendenhall* both deal with the use of the drug courier profile as a basis for detaining suspects in the nation's airports. The Court in *Mendenhall* did not resolve the question of the propriety of using profiles to establish reasonable suspicion. *See infra* text accompanying notes 64–66. In *Reid* the Court invalidated a seizure that was based in part on the officers' conclusion that the suspects exhibited characteristics consistent with the Atlanta drug courier profile. 448 U.S. 438, 440–41 (1980).

A case is pending in the Supreme Court in which the propriety of the use of a drug courier profile is likely to be confronted directly. Royer v. State, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1980), *cert. granted*, 454 U.S. 1079 (1981).

23. *See* Taylor v. Alabama, 102 S. Ct. 2664 (1982); Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Crews, 445 U.S. 463 (1980); Dunaway v. New York, 442 U.S. 200 (1979). *Taylor*, *Rawlings*, and *Dunaway* concerned claims that confessions or admissions obtained following an illegal detention were inadmissible fruits of the poisonous tree even though the suspects had been given *Miranda* warnings. All three cases confirmed the holding in Brown v. Illinois, 422 U.S. 590 (1975), that the giving of the *Miranda* warnings is a relevant, but not a

of the direct and indirect issues arising under a claim that an individual was seized illegally, fundamental questions remain unanswered.

It goes without saying that not every case is a fourth amendment case.[24] More accurate and to the point, not every situation in which an individual believes that his or her freedom of movement has been restricted by law enforcement officers constitutes a seizure within the meaning of the fourth amendment. Many cases arise in which defendants argue that evidence obtained and used against them at trial was the product, directly or indirectly, of an illegal seizure. But in many of these cases a question remains whether a seizure occurred prior to the discovery or disclosure of the evidence that allegedly is tainted. Unless an unlawful seizure occurred prior to the discovery of the evidence, the derivative evidence principle will not operate to exclude the evidence.[25] Thus, to fully define the scope of fourth amendment limits on seizures of people, the Supreme Court must not only define the circumstances under which a seizure will be permissible,[26] but it also must define with specificity the types of activity that constitute a seizure. The Supreme Court's development of a two-tier system of analysis of fourth amendment rights has complicated the attempt to identify the essential components of a seizure.[27] Intrusions (seizures) in the nature of limited restrictions on freedom of movement are permitted in circumstances in which probable cause to arrest is lacking, but the government has reasonable suspicion that criminal activity is present.[28] This type of government seizure is commonly referred to as a "stop."[29] All seizures of people in which the intrusion on individual freedom is greater than the limited intrusion authorized upon

---

decisive, consideration in determining whether a confession obtained following an illegal seizure is admissible. Taylor v. Alabama, 102 S. Ct. 2664, 2668 (1982); Rawlings v. Kentucky, 448 U.S. 98, 107 (1980); Dunaway v. New York, 442 U.S. 200, 217–18 (1979).

Crews held that, under the facts of the case, an eyewitness' in-court identification was not tainted by a pretrial identification by the witness, which was inadmissible because the defendant had been seized illegally. According to the Court, "[T]he toxin in this case [the illegal seizure] was injected only after the evidentiary bud [the witness' observations at the time of the crime] had blossomed; the fruit served at trial was not poisoned." 445 U.S. 463, 472 (1980).

24. *Cf.* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 267 (1981).

25. This statement represents nothing more than the unremarkable proposition that the exclusionary rule operates to suppress evidence only when it is the product of a prior illegality. In the context of evidence allegedly derived from an illegal seizure, an illegal seizure of the defendant first must be established.

26. *See infra* text accompanying notes 28–30.

27. *See generally* Comment, *Considering the Two-Tier Model of the Fourth Amendment*, 31 AM. U.L. REV. 85 (1981).

28. *See* Dunaway v. New York, 442 U.S. 200, 208–09 (1979) (citing Terry v. Ohio, 392 U.S. 1 (1968)). Although the term "reasonable suspicion" has been used to describe the test, courts also have used "articulable reasons" or "founded suspicion" as synonomous descriptive terms. United States v. Cortez, 449 U.S. 411, 417 (1981). A more precise statement, however, might be as follows: "An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity." United States v. Cortez, 449 U.S. 411, 417 (1981). *See also* Brown v. Texas, 443 U.S. 47, 51 (1979); Delaware v. Prouse, 440 U.S. 648, 661 (1979); United States v. Brignoni-Ponce, 422 U.S. 873, 884 (1975); Adams v. Williams, 407 U.S. 143, 146–49 (1972); Terry v. Ohio, 392 U.S. 1, 16–19 (1968).

29. The term "stop" first appeared in Terry v. Ohio, 392 U.S. 1, 10 (1968).

reasonable suspicion are characterized as an "arrest" and are valid only if justified by probable cause.[30]

Therefore, just as it is not always self-evident that a seizure has occurred, it may not be clear whether a particular seizure was a stop that could be justified on reasonable suspicion or was, rather, an arrest that required probable cause. If the quantum and quality of facts known to the officers at the time of the seizure constituted reasonable suspicion, but not probable cause, the legality of the seizure will depend on whether the seizure was of the limited variety authorized (a stop) or was, instead, an arrest. Thus, the Court must not only define the circumstances in which a stop will be authorized (as opposed to those in which an arrest is constitutionally permissible), it must also define with particularity the factual difference between the two types of seizures. In sum, every significant restriction of freedom of movement is a seizure within the meaning of the fourth amendment, but not every seizure is an arrest requiring the support of probable cause. Not every police-citizen encounter, however, involves a significant restriction of freedom of movement, and thus, not every such encounter is a seizure.

A substantial number of cases in lower federal courts and in state courts have considered attempts to suppress evidence alleged to be the fruit of an illegal seizure.[31] In these cases the courts have been confronted with one of the following questions. First, did the activities of the government that led to the discovery or disclosure of the evidence constitute a "seizure" within the meaning of the fourth amendment?[32] If no seizure occurred prior to the discovery or development of the evidence sought to be suppressed, no fourth amendment question is presented. Second, if a seizure occurred and if the seizure served as an essential link in the development of the evidence sought to be suppressed, was the seizure in the nature of a stop or an arrest?[33] If the information used to justify the seizure was less than probable cause, but sufficient to constitute reasonable suspicion, the characterization of the seizure as an arrest rather than as a stop will result in a finding of an illegal seizure, but if the seizure is found to constitute a stop it will be proper.

This Article will undertake a critical examination of these issues. How do we determine when there has been a seizure within the meaning of the fourth amendment? And how do we distinguish between seizures in the nature of a stop and those that constitute an arrest?

As the succeeding material demonstrates, two tests currently are em-

30. Dunaway v. New York, 442 U.S. 200 (1979); Whiteley v. Warden, 401 U.S. 560 (1971); Beck v. Ohio, 379 U.S. 89 (1964); Henry v. United States, 361 U.S. 98 (1959); Draper v. United States, 358 U.S. 307 (1959); Brinegar v. United States, 338 U.S. 160 (1949).

31. *See infra* cases cited in notes 32–33.

32. *See, e.g.*, United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); State v. Reid, 247 Ga. 445, 276 S.E.2d 617, *cert. denied*, 454 U.S. 883 (1981).

33. *See, e.g.*, Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981), *vacated and remanded on other grounds*, 102 S. Ct. 2951 (1982); People v. Harris, 15 Cal. 3d 384, 540 P.2d 632, 124 Cal. Rptr. 536 (1975).

ployed to resolve these issues. First, when the issue presented is whether a citizen has been seized, the question is whether the individual's freedom of movement has been significantly restricted by the actions of law enforcement officials, as determined from the perspective of a reasonable person under the circumstances.[34] Second, when the issue presented is whether the seizure was a stop or an arrest, the question is whether the restriction was more intrusive than the brief encounter for questioning authorized by *Terry v. Ohio*[35] and its progeny ("intrusiveness" under current standards is a function, largely, of the temporal and spatial scope of the seizure).[36]

A significant portion of this Article will be devoted to developing the thesis that the current method of analysis utilized by courts to resolve these issues under the tests previously described is incomplete and fails to protect fully the values implicit in the fourth amendment's proscription against unreasonable seizures. This Article will argue that the intrusiveness of an encounter between a citizen and law enforcement officials should be viewed as an element not only of the extent to which freedom of movement is restricted but also of the extent to which law enforcement evidence-gathering objectives are furthered. The intrusiveness of law enforcement activities in this respect operates in two important ways to resolve issues such as whether a seizure has occurred under the circumstances or whether the seizure was a stop or an arrest. First, when the activities of law enforcement officials convey the impression that an investigation of specific and identifiable criminal activity has commenced and they have reason to believe that the citizen is involved or possesses relevant information, a reasonable person is more likely to believe that he or she is not free to ignore the official request and walk away. Thus, for example, when the questions asked clearly are linked to specific and identifiable criminal activity and designed to elicit incriminating responses, the intrusion on individual privacy is greater than that occasioned by general questioning unrelated to any specific criminal activity, and the impression conveyed to the citizen is viewed more reasonably as an official investigation from which he or she is not free to depart. Second, when a seizure has occurred and the question is whether the seizure constitutes a stop or an arrest, the relevance of the intrusiveness of the encounter, in the sense of circumstances other than the actual loss of freedom of movement, is more apparent. The ability to detain a suspected criminal frequently enhances police investigatory objectives. As a result of a forcible encounter with law enforcement officials, a suspect may be questioned and subjected to evidence-gathering objectives that are not, as such, protected by the fourth amendment right of privacy, but that are dependent upon the government's right to custody of the suspect. Thus, although a suspect's likeness, voice, hair, or fingerprints have been characterized as exposed to the public and,

34. *See infra* text accompanying notes 104–13.
35. 392 U.S. 1 (1968).
36. *See infra* text accompanying notes 204–25.

therefore, generally not entitled to fourth amendment protection,[37] the government frequently will be unable to obtain this evidence without the ability to detain the suspect or to control his or her movements.

When the government obtains the right to detain a suspect, the individual loses the right to avoid contact with law enforcement officials and thereby loses perhaps not a right of privacy in a strict sense, but a more general right of privacy in the form of the right to control access to information. When the purpose of a seizure is the discovery of evidence otherwise constitutionally protected, such as admissions or confessions[38] or personal items in the person's possession at the time of the seizure,[39] the detention may be exploited to provide the opportunity to obtain such evidence. In the absence of prolonged detention or detention in a police-controlled environment, successful questioning of a suspect may be frustrated.[40] A detention of a suspect also implicitly carries the authority to detain personal items possessed at the time by the suspect. Detention of the suspect (and thereby the detention of his or her personal possessions) may provide the time necessary for law enforcement officials to gain lawful access to those possessions.[41] The intrusiveness of a seizure as previously described, therefore, is linked inextricably to privacy concerns and not just to the length and scope of the loss of individual freedom of movement.

II. When Is a Person Seized Within the Meaning of the Fourth Amendment?

A. *General Considerations*

The Supreme Court's efforts to define the concept of seizure have produced less than definite standards. In perhaps its most expansive treatment of the question, *Terry v. Ohio*,[42] the Court held that "[i]t is quite plain that the

37. United States v. Crews, 445 U.S. 463 (1980); United States v. Dionisio, 410 U.S. 1 (1973); Davis v. Mississippi, 394 U.S. 721 (1969). *See generally* Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection.").

38. Individuals have a constitutional right to remain silent. Miranda v. Arizona, 384 U.S. 436, 444 (1966).

39. The individual's constitutional right of privacy respecting items on his or her person at the time of a seizure may, of course, be lost under the "right . . . always recognized under English and American law" to search a person incident to arrest. Weeks v. United States, 232 U.S. 383, 392 (1914). *See also* New York v. Belton, 453 U.S. 454 (1981); United States v. Robinson, 414 U.S. 218 (1973); Chimel v. California, 395 U.S. 752 (1969).

40. Miranda v. Arizona, 384 U.S. 436, 451 (1966).

41. *See* Arkansas v. Sanders, 442 U.S. 753 (1979); United States v. Chadwick, 433 U.S. 1 (1977); *cf.* United States v. Edwards, 415 U.S. 800 (1974). *Sanders* held that the defendant's suitcase, seized from the trunk of the taxi in which he was riding at the time of his arrest and for which probable cause to search existed, could not be opened without a warrant. Instead, the police were required to seize the suitcase and retain possession until a warrant was obtained. 442 U.S. 753, 761–62 (1979). Earlier, *Chadwick* had applied the same reasoning to any item, not associated immediately with the person of the arrestee, taken incident to arrest. 433 U.S. 1, 15 (1977).

Edwards concerned the warrantless seizure of clothing worn by the accused at the time of his arrest. The seizure occurred some ten hours following arrest. The seizure was upheld, even though it was not substantially contemporaneous with the arrest, because the intrusion was no greater than that which could have taken place at the time of the arrest. 415 U.S. 800, 805 (1974). *See supra* note 9.

42. 392 U.S. 1 (1968).

Fourth Amendment governs 'seizures' of the person which do not eventuate in a trip to the station house and prosecution for crime—'arrests' in traditional terminology."[43] The *Terry* opinion also advises that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person" and that a seizure "takes place whenever a law enforcement officer 'by means of physical force or show of authority,' has in some way restrained the liberty of a citizen."[44] On the other hand, the *Terry* opinion warns that "not all personal intercourse between policemen and citizens involves 'seizures' of persons."[45] In perhaps its most prophetic statement on the subject, the *Terry* opinion also cautions that street encounters between citizens and police officers are "incredibly rich in diversity."[46]

Aside from these generalities, the *Terry* case itself provided little guidance in the resolution of a close case. In *Terry*, after the officer had approached the suspects on the street, he identified himself as a police officer and asked the suspects for their names. When the men mumbled something in response, the officer grabbed one of them, spun him around so that he was between the officer and the other two men, and patted down the outside of his clothing.[47] On these facts, the Court held that "there can be no question, then, that [the officer] 'seized' petitioner . . . when he took hold of him and patted down the outer surfaces of his clothing."[48] The ambiguity of the outcome in *Terry* was generated by qualifying language in the opinion that indicated the Court was unable to determine on the record "whether any such 'seizure' took place [before the officer initiated] physical contact for purposes of searching [the defendant] for weapons," but the Court "assume[d] that up to that point no intrusion upon constitutionally protected rights had occurred."[49] This assumption would appear to have been warranted, but only if one also assumes, as did Justice White in his concurring opinion in *Terry*, that "[t]here is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets,"[50] and also assumes, as did Justice Harlan in his concurring opinion, that in such cases "the person addressed has an equal right to ignore his interrogator and walk away."[51]

At first blush, Justices White and Harlan could be accused of stating the obvious and adding little to the resolution of the problem. Clearly, a police officer does not lose his right as an ordinary citizen to initiate conversation with others. Just as clear is the right of a citizen to avoid such conversation, and simply because he or she seeks to avoid a law enforcement officer does

43. *Id.* at 16.
44. *Id.* at 19 n.16.
45. *Id.*
46. *Id.* at 13.
47. *Id.* at 6–7. The officer's interest in the defendants was generated by their suspicious behavior; specifically, the officer believed that the defendants were "casing a job, a stick-up." *Id.* at 5–6.
48. *Id.* at 19.
49. *Id.* at 19 n.16.
50. *Id.* at 34 (White, J., concurring).
51. *Id.* at 32–33 (Harlan, J., concurring).

not and should not alter the situation. On the other hand, a slight modification of the principles proffered by Justices White and Harlan demonstrates the essence of the problem that has plagued the lower courts and that is at the heart of the difficulty in defining what constitutes a seizure. As the Supreme Court itself has recognized, "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime."[52] Professor Wayne LaFave has gone even further and has argued that whenever a police officer approaches a person and seeks an explanation for his activities or some evidence of identification, a show of authority is implicit; therefore, if the ultimate issue is whether a reasonable person would feel free to walk away, virtually all police-citizen encounters would constitute seizures.[53] Existing case law, of course, rejects the LaFave argument and continues to take the position that no seizure exists in police-citizen encounters which take place under circumstances in which the citizen's freedom to walk away is not limited by anything other than his desire to cooperate.[54] In the absence of imposition of physical restraints or unequivocal verbal instructions from the police officer that the person is not free to leave, the question to be answered, therefore, must be instead: What circumstances should control the decision whether, under the circumstances, a seizure has occurred?

The only Supreme Court decision since *Terry* that provides extended discussion of the concept of seizure is *United States v. Mendenhall*.[55]

---

52. Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam). The *Mathiason* case was concerned with the concept of "custodial interrogation," as that standard was used in Miranda v. Arizona, 384 U.S. 436 (1966), to establish the circumstances under which *Miranda* warnings must be given prior to questioning. *See infra* text accompanying note 161. The relationship between the concept of seizure and that of custody for purposes of the *Miranda* warnings never has been explored fully. A person is in custody for purposes of *Miranda* when he has been "deprived of his freedom of action in any significant way." Miranda v. Arizona, 384 U.S. 436, 444 (1966). The concept of custody, therefore, is similar, if not identical, to the broad definition of seizure. *See supra* text accompanying note 44. If the person has been seized pursuant to a *Terry* stop and is questioned, *Miranda* would appear to be applicable and the warnings should be given. The cases in the lower federal courts and in state courts have had some difficulty reconciling the two concepts. *See, e.g.* United States v. Mesa, 638 F.2d 582 (3d Cir. 1980); United States v. Collom, 614 F.2d 624 (9th Cir. 1979), *cert. denied*, 446 U.S. 923 (1980); United States v. Harris, 611 F.2d 170 (6th Cir. 1979); United States v. Jimenez, 602 F.2d 139 (7th Cir. 1979); State v. Wynn, 114 Ariz. 561, 562 P.2d 734 (Ct. App. 1977); McMillan v. United States, 373 A.2d 912 (D.C. 1977); State v. Bohanan, 220 Kan. 121, 551 P.2d 828 (1976).

53. *See* 3 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.2, at 50 (1978) [hereinafter cited as LAFAVE, SEARCH]. Professor LaFave's conclusion is shared by others. *See* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 110.1 commentary at 258 (Proposed Official Draft 1975) (many citizens will defer to police authority because they believe in some vague way that they should); L. TIFFANY, D. MCINTYRE & D. ROTENBERG, DETECTION OF CRIME 17 (1967) ("In high crime areas, particularly, persons who stop and answer police questions do so for a variety of reasons, including a willingness to cooperate with police, a fear of police, a belief that a refusal to cooperate will result in arrest, or a combination of all three.").

54. *E.g.*, United States v. Wylie, 569 F.2d 62, 67 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978).

55. 446 U.S. 544 (1980). In the companion case to *Terry*, Sibron v. New York, 392 U.S. 40 (1968), the Court avoided resolution of the seizure issue because the record was unclear. *Id.* at 63. The officer had observed Sibron in the presence of several known addicts. Sibron entered a restuarant where he was seen talking to three other addicts. The officer entered and asked him to step outside. Once outside, the officer said, "You know what I'm after." When Sibron "mumbled something and reached in his pocket," the officer also reached into Sibron's pocket and discovered heroin. *Id.* at 44–46. The Court held that it was unnecessary to decide whether a seizure occurred at the time the officer asked Sibron to step outside. *Id.* at 63.

Mendenhall, unfortunately, provides no definite guidance because of the absence of a working majority on the issues of whether and when a seizure occurred.[56] In *Mendenhall* agents of the Drug Enforcement Agency (DEA) approached the defendant, a black female, on the public concourse of the Detroit airport after observing her conduct while departing from a flight. Her behavior was considered characteristic of persons trafficking in narcotics.[57] The agents, two white males, identified themselves as federal agents and asked to see the defendant's identification and airline ticket. She produced a driver's license and ticket, each showing a different name. When asked by one of the agents to explain the discrepancy, she said that she "just felt like using that name"—the name which appeared on the ticket.[58] In response to a further question that apparently was directed to the length of her stay in California, she indicated that she had been there only two days.[59] The agents then identified themselves as federal narcotic agents, and according to the officers, the defendant became "quite shaken, extremely nervous," and "had a hard time speaking."[60] The agents returned her license and ticket and asked if she would accompany them to the DEA office for further questions. The defendant agreed[61] and, subsequently, was searched and found to be carrying heroin.[62] The Court of Appeals suppressed the heroin on the ground that the discovery of the heroin was the fruit of an unconstitutional detention that occurred in the concourse.[63] The Supreme Court reversed.

---

56. *See infra* text accompanying notes 64–66. Because of this division and the lack of a majority view, several courts have held that *Mendenhall* is not controlling. *See* United States v. Forero-Rincon, 626 F.2d 218, 219 n.3 (2d Cir. 1980); United States v. Robinson, 625 F.2d 1211, 1214 (5th Cir. 1980).

57. 446 U.S. 544, 547 n.1 (1980). According to the agents, the defendant attracted their attention because she had arrived on a flight from Los Angeles, a major source of heroin brought to Detroit. She appeared nervous and was the last person to leave the plane. She "scanned" the whole area. She proceeded past the baggage area without retrieving any luggage, and she changed to a different airline for a departing flight. *Id.* The use of the so-called drug courier profile has caused problems for numerous courts. *See* Greenberg, *Drug Courier Profiles*, Mendenhall *and* Reid: *Analyzing Police Intrusions on Less than Probable Cause*, 19 AM. CRIM. L. REV. 49, 52–53 (1981). Although the Supreme Court has yet to rule specifically on the propriety of using such profiles, it is likely to do so in the near future. *See* Royer v. State, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1980), *cert. granted*, 454 U.S. 1079 (1981). The profile used in *Royer* identified the defendant as a suspect because (1) the defendant was carrying American Tourister baggage, the standard brand for marijuana smuggling; (2) the defendant appeared nervous; (3) he paid for his ticket in cash from a roll of small denomination bills; and (4) rather than filling out a full name, address, and phone number on the baggage tags, he wrote on them the words "Holt" and "LaGuardia." 389 So. 2d 1007, 1016 (1980).

Courts have approved the use of profiles in other contexts. *See* United States v. Cyzewski, 484 F.2d 509 (5th Cir. 1973) (hijacking profile), *cert. denied*, 415 U.S. 902 (1974); United States v. Forbicetta, 484 F.2d 645 (5th Cir. 1973) (customs search), *cert. denied*, 416 U.S. 993 (1974); State v. Ochoa, 112 Ariz. 582, 544 P.2d 1097 (1976) (use of a profile to detect stolen vehicles).

58. 446 U.S. 544, 547–48 (1980). Her identification bore her true name, but the airline ticket was issued in the name of Annette Ford. *Id.*

59. *Id.* at 548.

60. *Id.*

61. *Id.* The defendant did not respond verbally to the request but did accompany the agents to the DEA office. Mr. Justice Stewart's characterization of the trip to the DEA office as consensual was made more difficult because one of the agents testified that had the defendant attempted to leave he would have stopped her. *Id.* at 575 n.12 (White, J., dissenting).

62. *Id.* at 548. Once at the DEA office, one of the agents asked if she would permit a search of her handbag and person. The agent informed the defendant that she had the right to refuse, but she nevertheless agreed to the search. A strip search uncovered two small packages of heroin concealed in her clothing. *Id.*

63. United States v. Mendenhall, 596 F.2d 706 (6th Cir. 1979).

Two members of the Court, Justices Stewart and Rehnquist, held that no seizure had occurred in the public concourse and that the defendant had consented voluntarily to accompany the agents to the DEA offices.[64] Four members of the Court disagreed. They argued that the defendant had been seized during the encounter with the DEA agents in the concourse and that the seizure was unlawful because the officers had lacked reasonable grounds for suspecting her of criminal activity.[65] The remaining three Justices assumed that the encounter in the concourse was a seizure, but held that the encounter was lawful since the officers had had reasonable suspicion that the defendant was engaged in criminal activity. These three Justices, in an opinion written by Justice Powell, found the seizure question "extremely close," although they were not necessarily prepared to support Justice Stewart's contention that no seizure had occurred.[66] Although *Mendenhall* provides no controlling opinion on the proper focus of inquiry when resolving the question whether a seizure has occurred under a given set of circumstances, the opinions of Justices Stewart and White do identify certain considerations that may be relevant to the resolution of the question in a particular case and that tend to narrow the focus of inquiry. Thus, although not constituting controlling precedent, the two opinions are worthy of consideration.

Justice Stewart began analysis of the question whether a seizure had occurred in the concourse by accepting the definition of seizure that first appeared in *Terry*: "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."[67] According to Justice Stewart, "As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty . . . as would under the Constitution require some particularized and objective justification."[68] Justice Stewart next focused on the problem that is present in many cases: the existence of evidence that the officer subjectively intended or believed at the time of the encounter that the individual was free to leave, while the individual subjectively believed that he was not free to leave. Justice Stewart argued that a seizure would arise "within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a *reasonable person* would have believed that he was not free to leave."[69] Specifically, the officer's subjective intent to detain a

64. 446 U.S. 544, 555–57 (1980).

65. *Id.* at 566 (White, J., dissenting). Justices Brennan, Marshall, and Stevens joined Justice White's dissent. The dissenting Justices said that the agent's justification for the seizure was " 'his inchoate and unparticularized suspicion or "hunch," ' rather than' "specific" reasonable inferences which he is entitled to draw from facts in light of his experience.' " *Id.* at 573 (quoting Terry v. Ohio, 392 U.S. 1, 27 (1968)).

66. 446 U.S. 544, 573 (1980) (Powell, J., concurring), Chief Justice Berger and Justice Blackmun joined Justice Powell's opinion. *Id.* at 560 The concurring Justices agreed, however, with Justice Stewart's conclusion that the defendant voluntarily accompanied two officers to the DEA office and consented to the search of her person and possessions. *Id.*

67. *Id.* at 552 (citing Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968)).

68. 446 U.S. 544, 554 (1980).

69. *Id.* (emphasis added).

suspect was considered irrelevant "except insofar as that may have been conveyed to the [defendant]."[70] By implication, Justice Stewart also rejected as irrelevant the subjective belief of the person confronted.

Justice Stewart then turned to the circumstances that he thought would be relevant to the resolution of the question under the reasonable man standard. Although he did not purport to frame an exhaustive list, he did identify as indicative of a seizure (1) the threatening presence of several officers, (2) the display of weapons, (3) some physical touching of the person of the citizen, and (4) the use of language or tone of voice indicating that compliance with the officer's request might be compelled.[71] As support for his conclusion that no seizure had taken place in the concourse, Justice Stewart noted in *Mendenhall* that the agents had worn no uniforms and had displayed no weapons, they had not summoned the defendant to their presence but instead approached her, they had requested but did not demand to see identification and the ticket, and the events had taken place in a public concourse.[72] According to Justice Stewart, this conclusion was unaffected even though the defendant had not been expressly told by the agents that she was free to decline to cooperate.[73]

Justice White's dissenting opinion on the seizure issue is devoted largely to Justice Stewart's willingness to deal with the issue when, at the district court level, the government had conceded that a seizure had occurred.[74] On the merits of the seizure issue, Justice White, while not disagreeing openly with Justice Stewart's premise that the question is what a reasonable person would have believed under the circumstances, argued that Justice Stewart ignored probative objective factors that clearly evinced a seizure—the officers had taken possession of the defendant's plane ticket and driver's license. Justice White proffered that it "is doubtful that any reasonable person about to board a plane would feel free to leave while law enforcement officers have her plane ticket."[75] Justice White also asserted that Justice Stewart's attempted reconciliation of two other Supreme Court cases, both of which held that a seizure had occurred under the circumstances, did not contain an analysis of the extent to which a reasonable person would have thought he or she was free to leave.[76] It is unclear whether Justice White advanced this deficiency in Justice Stewart's opinion for purposes of demonstrating that the "reasonable man" standard should not be controlling, or merely for purposes of demonstrating the analytical weakness of the Stewart opinion in *Mendenhall*.

---

70. *Id.* at 554 n.6.

71. *Id.* at 554.

72. *Id.* at 555.

73. *Id.*

74. *Id.* at 567–69 (White, J., dissenting). Justice Stewart argued that it was both necessary and appropriate for the Court to resolve the seizure issue because decisions by both the District Court and the Court of Appeals rested upon a "serious misapprehension" of federal law and because the resolution of that issue was "essential to the correct disposition of the other issues in the case." 446 U.S. 544, 551 n.5 (1980).

75. *Id.* at 570 n.3 (White, J., dissenting).

76. *Id.* at 570 n.5.

The two earlier Supreme Court cases that both Justices Stewart and White discussed in *Mendenhall*, while not particularly enlightening on the meaning of the concept of seizure, are worthy of brief mention. The first, *Brown v. Texas*,[77] was a paradigmatic stop and frisk case. In *Brown* cruising police officers observed the defendant in an alley walking away from another man in an area with a high incidence of drug traffic. The officers believed that the two men had been together or were about to meet when the patrol car appeared.[78] The officers drove into the alley, got out, and asked the defendant to identify himself and explain what he was doing there. The defendant refused and "angrily asserted that the officers had no right to stop him."[79] The defendant then was frisked. When the defendant continued in his refusal to identify himself, he was arrested for the crime of failure to give name and address to an officer "who has lawfully stopped him and requested the information."[80] The Court in *Brown* held that "[w]hen the officers detained [the defendant] for the purpose of requiring him to identify himself, they performed a seizure of his person subject to the requirements of the Fourth Amendment."[81] Furthermore, "[N]one of the circumstances preceding the officers' detention . . . justified a reasonable suspicion that he was involved in criminal conduct"; therefore, since the stop was not lawful, the defendant could not be punished under the statute for refusing to identify himself.[82]

In *Brown* the Court did not attempt to identify precisely when the seizure had occurred, nor did the Court attempt to explain why, under the circumstances, it concluded that a seizure had occurred. Justice Stewart's opinion in *Mendenhall*, however, asserts that "[i]t could not have been plainer under the circumstances there presented [in *Brown*] that [the defendant] was forcibly detained by the officers."[83] Justice Stewart's *Mendenhall* opinion also identifies, by implication, when in the *Brown* case the encounter turned into a seizure. Justice Stewart described the encounter in *Brown* as follows:

> In that case, two police officers approached [the defendant] in an alley, and asked him to identify himself and to explain his reason for being there. [The defendant] "refused to identify himself and angrily asserted that the officers had no right to stop him" . . . . Up to this point there was no seizure. But after continuing to protest the officers' power to interrogate him, [the defendant] was

77. 443 U.S. 47 (1979).

78. *Id.* at 48. One officer also testified that he stopped the defendant because the situation "looked suspicious and [he] had never seen that subject in that area before." *Id.* at 49.

79. *Id.* at 49.

80. *Id.* Since the Court reversed on the ground that no reasonable suspicion existed for the initial stop, it did not reach the question of the constitutionality of the Texas "stop and identify" statute. *Id.* at 53 n.3. In Michigan v. DeFillippo, 443 U.S. 31 (1979), the Court again avoided resolution of the constitutional question presented by "stop and identify" statutes. In *DeFillippo* the Court assumed that such statutes were unconstitutional, but held that an arrest made in good-faith reliance on a presumptively constitutional statute was legal for purposes of validating a search made incident to arrest. *Id.* at 39–40. For a treatment of the problems presented by "stop and identify" statutes, see *Stop and Identify Statutes: A New Form of an Inadequate Solution to an Old Problem*, 12 RUT. L.J. 585 (1981).

81. 443 U.S. 47, 50 (1979).

82. *Id.* at 51–52.

83. 446 U.S. 544, 556 (1980).

> first frisked, and then arrested. . . . The Court simply held in that case that because the officers had no reason to suspect [the defendant] of wrongdoing, there was no basis for detaining him . . . .[84]

Justice Stewart's *Mendenhall* opinion apparently concludes that in *Brown* the encounter became a seizure at the point of the frisk. As Justice White also correctly alleges in his *Mendenhall* dissent, the government did not contest the seizure question in *Brown* (thus accounting for the lack of specificity on the issue), but instead sought to justify the seizure on reasonable suspicion grounds.[85] Finally, Justice White was correct in his assertion that Justice Stewart made no attempt in *Mendenhall* to test the facts in *Brown* against the standard of what a reasonable man would have thought under the circumstances.[86]

The second seizure case discussed in *Mendenhall* by Justices Stewart and White was *United States v. Brignoni-Ponce*.[87] In *Brignoni-Ponce* the Border Patrol stopped the defendant's vehicle near the Mexican border because the occupants appeared to be Mexican. The officers questioned the passengers about their citizenship and discovered that they were illegal aliens.[88] Nowhere in the *Brignoni-Ponce* opinion does the Court expressly declare that the act of stopping a moving vehicle constitutes a seizure. For fairly obvious reasons, everyone apparently assumed that it was a seizure. The Court simply held that a roving patrol of immigration officers can stop a vehicle in the general area of any international border whenever the officers reasonably suspect that the vehicle might contain illegal aliens.[89] Justice Stewart's view of the relevance of *Brignoni-Ponce* to the resolution of the *Mendenhall* case was that since a seizure in the context of the stop of a vehicle is materially more intrusive than a question put to a passing pedestrian, because it provides an opportunity for visual inspection of the vehicle not otherwise possible, considering a stop of an automobile as a seizure tells us very little about the constitutional status of encounters such as those that occurred in *Brown* or in *Mendenhall* itself.[90] Justice White asserted in *Mendenhall* that this reasoning "confuse[d] the question of the quantum of reasonable suspicion necessary to justify such seizures with the question whether a seizure occurred."[91] Why Justice Stewart viewed the intrusive nature of an automobile stop as relevant to the question whether a seizure

---

84. *Id.*

85. *Id.* at 570 n.5 (White, J., dissenting).

86. *Id.* at 570.

87. 422 U.S. 873 (1975).

88. *Id.* at 875. In *Brignoni-Ponce* the Government contended that the officer's observations that the occupants were of Mexican descent by itself furnished reasonable suspicion that they were illegal aliens. The majority rejected this claim. *Id.* at 885–86. For a discussion of the particular problems associated with border stops, see Greenberg, *Drug Courier Profiles*, Mendenhall *and* Reid: *Analyzing Police Intrusions on Less than Probable Cause*, 19 AM. CRIM. L. REV. 49, 57–62 (1981).

89. 422 U.S. 873, 882 (1975). *See infra* text accompanying notes 199–200.

90. 446 U.S. 544, 556–57 (1980).

91. *Id.* at 570 n.5 (White, J., dissenting).

occurs whenever an automobile is stopped, at least if the concept of seizure is viewed as turning on whether there has been a restriction of freedom of movement or action, is difficult, initially, to understand. On the other hand, if the concept of seizure implicates considerations other than simple physical restraints, then Justice Stewart's distinction is probative. Certainly, there is nothing inherent in the concept of seizure that would limit it to the question whether a restriction of movement or freedom of action had occurred. Seizure could be viewed, quite properly, as a more abstract concept that includes not only physical aspects (*i.e.*, restraint on movement) but also intangible aspects in the nature of the right to avoid contact with government officials that would or might affect rights more commonly associated with rights of privacy. Justice Stewart, unfortunately, did not pursue this intriguing notion.[92]

We are left, therefore, with precedent from the Supreme Court that is not particularly helpful in resolving the question whether and when contact between a law enforcement official investigating criminal activity and a citizen constitutes a seizure within the meaning of the fourth amendment.

A review of the numerous cases[93] in the lower federal courts and in the state courts reveals, however, several recurring themes that appear relevant, at least facially, to the resolution of the seizure issue. From these cases one can identify the elements that, consistent with the general guidelines established by the Supreme Court cases previously described, aid in the resolution of the question. These elements include the issues: first, from whose perspective to judge whether there has been a restriction of freedom of movement;[94] second, the appropriate method of evaluating the physical aspects of the encounter;[95] third, the appropriate method of evaluating the verbal aspects of the encounter,[96] including the relevance of the police officer's failure to inform the citizen that he or she is free to ignore the officer's questions and walk away;[97] fourth, the relevance of the use or display of force in the encounter;[98] fifth, the relevance of police requests or commands to alter the location of the encounter;[99] and sixth, the relevance of the intrusive nature of the encounter, including circumstances such as the nature of the questions asked,[100] the location of the encounter,[101] and any police requests or com-

92. For a discussion of this distinction in other cases, see *infra* text accompanying notes 240–44.

93. *See infra* cases cited at notes 94–102.

94. *See, e.g.*, United States v. Beck, 598 F.2d 497 (9th Cir. 1979); State v. Tsukiyama, 56 Hawaii 8, 525 P.2d 1099 (1974).

95. *See, e.g.*, United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980); Ebarb v. State, 598 S.W.2d 842 (Tex. Crim. App. 1980).

96. *See, e.g.*, United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980); People v. Chestnut, 51 N.Y.2d 14, 409 N.E.2d 958, *cert. denied*, 449 U.S. 1018 (1980).

97. *See, e.g.*, United States v. Patino, 649 F.2d 724 (9th Cir. 1981).

98. *See, e.g.*, United States v. White, 648 F.2d 29 (D.C. Cir. 1981); United States v. Strickler, 490 F.2d 378 (9th Cir. 1974).

99. *See, e.g.*, United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980); Wilkerson v. United States, 427 A.2d 923 (D.C. 1981).

100. *See, e.g.*, United States v. Setzer, 654 F.2d 354 (5th Cir. 1981); United States v. Robinson, 625 F.2d 1211 (5th Cir. 1980).

101. *See, e.g.*, United States v. Johnson, 626 F.2d 753 (9th Cir. 1980).

mands for identification or other documents or for submission to a search of the person or of his or her possessions.[102] Under the general standard promulgated in *Terry*[103] these elements must be considered, when appropriate under the circumstances, in determining whether, by means of physical force or show of authority, a police officer has restrained a person's freedom of movement.

B. *Objective v. Subjective Focus*

Courts must resolve the basic issue whether, under the totality of the circumstances in a police-citizen encounter, the citizen's freedom to walk away was restricted under the guise of official authority or whether the citizen's freedom of movement was limited only by his or her desire to cooperate with the police. Absent either verbal commands from the officer specifically confirming that the person is not free to depart[104] or physical contact that interrupts movement or limits the ability of the person to depart from the scene,[105] the encounter most likely will produce differing conclusions on the ultimate question, depending upon the perspective from which one views the situation. One easily can envision a case in which the police officer does not intend to restrict an individual's freedom of movement, takes no action, and makes no statements that he intended or reasonably believed would convey the impression that the citizen's right to walk away was restricted by official action, but one which, because of the surrounding circumstances of the encounter, the citizen reasonably believed was a forcible restriction on his freedom of movement. In other words, many cases probably will arise in which the encounter was viewed and intended by the officer as an attempt to gain information from a citizen that depended entirely upon the citizen's willingness to cooperate, but one in which the citizen subjectively believed that he was not free to terminate by ignoring the officer and walking away.

The reasonable man test, however, has been criticized. As previously mentioned, Professor LaFave has posited that a show of authority is implicit in the great bulk of cases in which a police officer approaches a person and seeks an explanation for his activities or some evidence of identification.[106] Therefore, if the ultimate issue is whether a reasonable person would feel free to walk away, then virtually all police-citizen encounters would constitute seizures.[107] Professor LaFave argues, however, that the crucial question should not be whether a reasonable person would feel free to walk away—realistically the answer would almost always be "no"—but whether as a

102. *See, e.g.*, United States v. Lara, 638 F.2d 892 (5th Cir. 1981); United States v. Hill, 626 F.2d 429 (5th Cir. 1980).

103. 392 U.S. 1 (1968).

104. *See infra* text accompanying notes 137–39.

105. *See infra* text accompanying notes 123–28.

106. *See supra* text accompanying note 53.

107. LAFAVE, SEARCH, *supra* note 53, § 9.2(g), at 50.

matter of policy we should allow the police to rely on the moral and instinctive pressure to cooperate inherent in these encounters by not treating them as seizures.[108] Professor LaFave concludes that the answer should be "yes" provided the police officer did not add to the inherent pressure by engaging in menacing conduct significantly beyond that which is accepted in social intercourse.[109]

Justice Stewart, in *Mendenhall*, recognized that in many cases the resolution of the seizure issue could turn on the selection of a perspective from which to view the situation. Justice Stewart rejected an approach based on the subjective intent or belief of the officer or on the subjective belief of the defendant, and proffered instead a test of whether under the circumstances a "reasonable person would have believed that he was not free to leave."[110] Justice Stewart's test was not novel and had been adopted in the lower courts[111] prior to *Mendenhall* and used by the Supreme Court in modified form to solve related problems.[112]

Under the objective reasonable man standard it would be irrelevant, for example, that the police officer did not intend to restrict the person's ability to walk away if his conduct or verbal assertions would convey a different impression to a reasonable man; apparently it also would be irrelevant that the officer intended to seize the person if neither his conduct nor his verbal assertions would convey that impression to a reasonable man.[113] Also irrelevant would be the assertion that the defendant was a timid, authority-conscious person who would submit willingly to the slightest suggestion of authority, or that he or she was a contentious, antiauthoritarian figure willing to test the outer limits of the exercise of official discretion.

Several courts also have suggested, in a slightly different context, that the objective reasonable man standard should be refined to embody the notion of

---

108. *See* J. CHOPER, Y. KAMISAR & L. TRIBE, THE SUPREME COURT: TRENDS AND DEVELOPMENTS 140–41 (1981). Professor LaFave argues that the "moral and instinctive pressures" to cooperate with a police officer "are in general sound and may be relied on by the police." LAFAVE, SEARCH, *supra* note 53, § 9.2(g), at 53.

109. LAFAVE, SEARCH, *supra* note 53, § 9.2(g), at 53. Professor LaFave posits that the critical inquiry under this approach would be whether the police officer initiating the encounter "conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occcurred between two ordinary citizens." *Id.* Using the LaFave analysis, even physical contact would be acceptable if it was of the type that constitutes a normal means of attracting attention. *Id.* at 54. Courts are divided on the appropriateness of the use of LaFave's analysis. *See* United States v. Setzer, 654 F.2d 354, 358 (5th Cir. 1981) ("offensive" statement by the officer did not by itself render the encounter a seizure). *See also infra* text accompanying notes 171–73. *Compare* Login v. State, 394 So. 2d 183 (Fla. Dist. Ct. App. 1981), *with* United States v. Coleman, 450 F. Supp. 433 (E.D. Mich. 1978).

110. 446 U.S. 544, 554 (1980).

111. *See, e.g.*, United States v. Beck, 598 F.2d 497 (9th Cir. 1979); United States v. Oates, 560 F.2d 45, 58 (2d Cir. 1977); State v. Tsukiyama, 56 Hawaii 8, 525 P.2d 1099 (1974).

112. In Rhode Island v. Innis, 446 U.S. 291 (1980), the Supreme Court held that for purposes of determining whether an individual had been "interrogated," as that concept is relevant under the holding in Miranda v. Arizona, 384 U.S. 436 (1966), the subjective intent of the police, while relevant, would not be controlling. 446 U.S. 291, 301–02 (1980).

113. *See* United States v. Mendenhall, 446 U.S. 544, 554 n.6 (1980); United States v. Viegas, 639 F.2d 42, 44 (1st Cir. 1981); United States v. Fry, 622 F.2d 1218, 1220 (5th Cir. 1980).

what a reasonable man, innocent of any crime, would have thought under the circumstances.[114] Although no definite explanation of this psychological modification has been proffered, the suggestion apparently considers a guilty suspect as more likely to perceive an encounter with a police officer as the first step leading to arrest and prosecution (a seizure). An innocent person, on the other hand, having nothing to hide, presumably would not immediately jump to the conclusion that an encounter with a police officer is always a restriction on his right to walk away at will. Whether this modification is inconsistent with Justice Stewart's *Mendenhall* opinion is unclear.

The objective reasonable man standard has several obvious advantages. First, it eliminates the prospect that the test itself will ordain the outcome. A test based upon the subjective belief or intent of the officer or on the subjective belief of the defendant probably will produce the testimony that the subjective belief or intent was present at the time.[115] Second, the objective reasonable man standard allows courts to develop standards of conduct to guide the activities of law enforcement officials, thus eliminating the necessity of requiring police officers to make ad hoc judgments concerning the nuances of their words or behavior or of the psychological makeup of the person with whom they are dealing.[116]

The problems with a wholly objective reasonable man standard are obvious. If an individual subjectively believes that he or she has been deprived of his or her freedom of movement under the guise of official authority and submits, the deprivation is complete. The loss of the right to walk away is irreversible once the freedom to walk away has been forfeited (albeit mistakenly), and an individual gains little personal satisfaction by a judicial declaration thereafter that the right never actually was given up. The use of the objective reasonable man standard, therefore, arises from judicial recognition that the fourth amendment is designed principally to control or limit official discretion—a regulatory model—to keep us collectively secure, rather than to protect particular individuals against the loss of rights that thereby are guaranteed.[117] That an individual has lost something because of official activity is not as important as "whether the government has engaged in activity which if left unregulated would pose a threat to the security of people generally."[118]

---

114. United States v. Johnson, 626 F.2d 753, 755 (9th Cir. 1980); United States v. Beck, 598 F.2d 497, 500 (9th Cir. 1979); United States v. Wylie, 569 F.2d 62, 68 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); United States v. Medina-Pena, 520 F. Supp. 227, 230 (S.D. Texas 1981).

115. LAFAVE, SEARCH, *supra* note 53, § 9.2(g), at 52.

116. *Id.* As Professor LaFave has noted, however, the use of a reasonable person standard does not solve the problem. He argues that an average person most likely will feel obliged to stop and respond to any inquiry by a police officer. Thus, an honest use of the reasonable person standard should result in a finding that a seizure occurred in most cases. Professor LaFave further asserts that we also must be prepared, therefore, to accept the notion that the "moral and instinctive" pressures to cooperate will not, in themselves, warrant a finding that a seizure occurred. *See supra* notes 108–09.

117. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974).

118. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493, 496–97 (1980).

C. *Use of Physical Force or Show of Authority*

While the ultimate question remains whether the individual's freedom of movement has been restrained (judged by the reasonable man standard), *Terry*[119] also clearly requires that the restriction flow from a police officer's show of authority or use of physical force.[120] This requirement necessarily demands the evaluation of the elements discussed earlier.[121] In some instances the activities of the officers, whether physical or verbal, are clear and unambiguous; in other instances the conclusion to be drawn under the reasonable man standard requires the exercise of refined judgment and also may necessitate consideration of such subtle factors as the tone of the officer's voice.[122]

1. *Use of Physical Force to Obstruct Freedom of Movement*

Clearly, any physical activity by the police that interrupts or impedes a suspect's locomotion should weigh heavily in favor of finding a seizure. Impeding the flow of automobile traffic by means of a roadblock[123] or stopping a single automobile through a show of authority, such as a police cruiser with the siren on,[124] is conduct typical of this category. In the street encounter situation, physically restraining movement through bodily contact, such as a hand on the shoulder or arm, or otherwise physically obstructing movement, such as bodily blocking the path of a walking or running suspect, likewise should weigh heavily in favor of finding a seizure.[125] Since the test for a seizure depends ultimately on the finding of a restriction of freedom of movement or action (*i.e.*, the right to disengage and walk away), any physical action by the officer that impedes freedom of movement, or that could be interpreted reasonably as doing so,[126] apparently would present the paradigmatic seizure. If an in-motion suspect has been restrained physically, a

---

119. 392 U.S. 1 (1968).

120. *Id.* at 19 n.16. *See supra* text accompanying notes 42–44.

121. *See supra* text accompanying notes 94–102.

122. United States v. Mendenhall, 446 U.S. 544, 554 (1980); United States v. Lara, 638 F.2d 892, 896 (5th Cir. 1981); United States v. Elmore, 595 F.2d 1036, 1042 (5th Cir. 1979), *cert. denied*, 447 U.S. 910 (1980).

123. *See* State v. Hilleshiem, 291 N.W.2d 314 (Iowa 1980). Although a roadblock may constitute a seizure, the reasonableness of the seizure may be established by circumstances other than an objective and particularized basis for believing that criminal activity is afoot. Delaware v. Prouse, 440 U.S. 648, 657 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976). *See* LAFAVE, SEARCH, *supra* note 53, § 9.5, at 140–45.

124. Colorado v. Bannister, 449 U.S. 1, 4 n.3 (1980) (per curiam) (dictum); Delaware v. Prouse, 440 U.S. 648, 662 (1979); Henry v. United States, 361 U.S. 98, 99 (1959); Sharpe v. United States, 660 F.2d 967, 968 (4th Cir. 1981), *vacated and remanded on other grounds*, 102 S. Ct. 2951 (1982); United States v. Ramos-Zaragosa, 516 F.2d 141, 142 (9th Cir. 1975).

125. United States v. Mendenhall, 446 U.S. 544, 554 (1980) ("Examples of circumstances that might indicate a seizure . . . would be . . . some physical touching . . . ."); United States v. Bowles, 625 F.2d 526, 532 (5th Cir. 1980) (blocking the path of the suspect walking through an airport concourse). *But see* State v. Reid, 247 Ga. 445, 276 S.E.2d 617, *cert. denied*, 454 U.S. 883 (1981) (mere tap on shoulder at outset to get the defendant's attention not enough to turn contact into a seizure).

126. Physical activities by police officers that reasonably could be interpreted as limiting freedom of movement include taking possession of personal property belonging to the suspect. United States v. Mendenhall, 446 U.S. 544, 570 n.3 (1980) (White, J., dissenting); United States v. Pulvano, 629 F.2d 1151, 1155 (5th Cir. 1980). *See infra* text accompanying notes 148–49.

fortiori his freedom to walk away has been restricted even if only for the short period a police officer would need to explain that he did not intend to impede the suspect's freedom and that if the suspect was not willing to cooperate, he or she was free to move on.

A seizure may occur even in the absence of a finding that physical barriers or other actions of a police officer had interrupted an in-motion suspect's freedom of movement.[127] A person has been seized when he or she has been denied the right to disengage, that is, to walk away, and this view of seizure does not require the physical obstruction of an in-motion suspect or the physical obstruction of a suspect who is attempting to disengage. If physical barriers are imposed, such as a police cruiser blocking the natural path of the suspect's automobile or several police officers surrounding a stationary suspect, the situation should not be viewed as materially different from blocking the movement of an in-motion suspect or of one who is attempting to disengage.[128]

2. *Show of Authority*

Physical obstruction of a suspect's freedom of movement, however, is not the *sine qua non* of a seizure. The Supreme Court also has indicated that a seizure may occur when the deprivation results from a show of authority.[129] This component of the test is much more difficult to quantify, but obviously is designed to reflect the notion that freedom of movement may be restricted by conduct other than physical restraint. A show of authority would include any conduct by the police, whether verbal or otherwise, that would indicate to a reasonable person that he or she was not free to ignore the officer and walk away.

A show of authority can be manifested in a variety of ways. The physical manifestation of a show of authority would include, for example, the display of weapons[130] or other conduct that makes it impracticable for the suspect to leave.[131] Clearly, in terms of the response of a reasonable person, an encounter with a law enforcement officer displaying the force of arms should be a compelling, if not a controlling, factor in favor of finding that a seizure has occurred.[132] When an officer approaches a suspect with guns drawn or in a manner which makes it clear (to a reasonable person) that force will be used at

---

127. Ebarb v. State, 598 S.W.2d 842, 850 (Tex. Crim. App. 1980) ("A 'stop' has no more to do with a person's prior motionlessness than a 'frisk' has to do with his prior friskiness.").

128. United States v. Patterson, 648 F.2d 625 (9th Cir. 1981); United States v. Vargas, 633 F.2d 891 (1st Cir. 1980); United States v. Beck, 602 F.2d 726, 728 n.1 (5th Cir. 1979) ("A stop within the meaning of the fourth amendment does not mean a physical stop, but rather a 'restraint' of movement.").

129. Terry v. Ohio, 392 U.S. 1, 19 n.16 (1968).

130. United States v. Mendenhall, 446 U.S. 544 (1980).

131. *See infra* text accompanying notes 133–36.

132. In most cases in which a display of force has been used during a police-citizen encounter, the courts have assumed that a seizure has occurred and the only question remaining is whether the seizure was a stop or a full-scale arrest. *See infra* text accompanying notes 250–51. *See generally* United States v. White, 648 F.2d 29, 34–35 (D.C. Cir. 1981); United States v. Strickler, 490 F.2d 378, 380 (9th Cir. 1974).

the slightest provocation (for example, an officer with his hand on a holstered firearm), the paradigmatic show of authority exists.

A second class of cases in which the physical activities of the police would indicate a show of authority constituting a restriction of freedom of movement would be those in which the encounter includes a frisk of the suspect.[133] The *Terry* case[134] represents a classic illustration of this point. In *Terry* no independent and significant physical disruption of the defendant's freedom of movement occurred; instead the facts included an approach, a few questions asked, mumbled responses, and the physical act of grabbing the defendant, spinning him around, and patting down the outside of his clothing.[135] In *Terry* the record was barren of sufficient facts for the Court to determine whether a seizure occurred for the purpose of conducting the frisk prior to the physical contact, but the Court in *Terry* clearly held that once the frisk occurred a seizure resulted.[136] In other words, the physical actions of the police in frisking a suspect, even if unaccompanied by other manifestations of physical restraint or words indicating that the suspect was not free to leave, should be viewed as a show of authority sufficient to indicate a restraint on freedom of movement. A person subjected to a frisk could not reasonably conclude that, once the officer has commenced the act of frisking, an attempt to disengage would be permitted before the frisk was complete.

The verbal actions of the officers frequently will control the show of authority component of the test. Commands to a suspect, such as "Stay where you are!" or "Don't move!," express a clear message to the suspect that he or she is not free to disengage and should be viewed as indicative of a seizure.[137] On the other hand, apart from the verbal command that clearly manifests a deprivation of freedom under the guise of lawful authority, the verbal activities of the police officer are likely to be more ambiguous. Lower courts have recognized, and Justice Stewart's opinion in *Mendenhall*[138] agrees, that an evaluation of a police officer's verbal communications may require the consideration of such subtle concerns as the tone of the officer's voice.[139] This view, of course, represents a recognition that the show of authority which would be sufficient to convey to a reasonable person the impression that he or she was not free to leave must include circumstances other than express verbal commands or statements that the suspect is not free to leave, physical conduct conveying that impression, such as the display of firearms or the frisking of the suspect, and outright physical obstruction of locomotion or

133. Brown v. Texas, 443 U.S. 47, 49 (1979); Terry v. Ohio, 392 U.S. 1, 19 (1968). *See supra* text accompanying notes 48 & 84.

134. 392 U.S. 1 (1968).

135. *Id.* at 19.

136. *Id.*

137. People v. Tebedo, 81 Mich. App. 535, 265 N.W.2d 406 (1978); People v. Chestnut, 51 N.Y.2d 14, 409 N.E.2d 958, *cert. denied*, 449 U.S. 1018 (1980).

138. United States v. Mendenhall, 446 U.S. 544 (1980).

139. *See supra* note 122.

attempted locomotion. These circumstances, which include most commonly an evaluation of the verbal activities of the police, do, indeed, require the exercise of a refined judgment and confirm that the Court was correct when it described such encounters as "rich in diversity."[140] Nevertheless, it is possible to isolate relevant elements and to examine their import in terms of how they might be viewed by a reasonable person. These elements would include such diverse circumstances as the location of the encounter, the length of the encounter, the words used to effectuate the initial encounter, the nature of the questions asked, the existence of any police requests for documents or for moving the encounter to a more convenient location, police requests for consent to a search of the suspect's person or property, and the absence of explicit statements from the officer that the suspect is free to ignore the officer's inquiry and walk away. In all likelihood, no single element would be controlling.

The location of the encounter, for example, may be relevant in the totality of the circumstances. Police-citizen encounters that take place in public areas should be viewed more reasonably as fortuitous and unrelated to the investigation of specific crime. Therefore, such encounters are less likely to be reasonably viewed as a show of authority that restricts freedom of movement.[141] When the encounter moves out of the domain of public or quasi-public property, and into areas normally not frequented by the public,[142] the reasonable conclusion would be that the officer initiating a contact was prepared to deny the suspect the right to disengage. Thus, police-citizen encounters initiated when an officer seeks out a particular suspect in his home or

---

140. Terry v. Ohio, 392 U.S. 1, 13 (1968).

141. Apart from the paradigmatic street encounter between police officer and citizen, airport surveillance programs have produced the largest number of litigated claims. *See, e.g.*, United States v. Berry, 670 F.2d 583 (5th Cir. 1982); United States v. Harrison, 667 F.2d 1158 (4th Cir. 1982); United States v. Setzer, 654 F.2d 354 (5th Cir. 1981); Royer v. State, 389 So. 2d 1007 (Fla. Dist. Ct. App. 1979), *cert. granted*, 454 U.S. 1079 (1981).

Encounters that occur on public streets or in areas that the public is free to traverse, such as airport facilities, are the subject of routine patrol by law enforcement officials, and it may be assumed that the public is aware of this fact. An encounter with a law enforcement official in the public domain, therefore, is not an unusual occurrence.

The Supreme Court adopted a similar rationale in upholding the fixed checkpoint stop conducted close by the border to detect illegal aliens. In United States v. Martinez-Fuerte, 428 U.S. 543 (1976), the Court contrasted the impact of fixed checkpoints with those of roving patrols:

> Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints. . . . Second, checkpoint operations both *appear to* and actually involve less discretionary enforcement activity . . . . [T]he stops should not be frightening or offensive because of their public and relatively routine nature.

Id. at 559–60 (emphasis added). *See infra* text accompanying note 222. A similar view was expressed in Delaware v. Prouse, 440 U.S. 648, 657 (1979), which produced the following observation from Justice Rehnquist: "Because motorists, apparently like sheep, are much less likely to be 'frightened' or 'annoyed' when stopped en masse, [the Court adopts a different standard] . . . . The Court thus elevates the adage 'misery loves company' to a novel role in Fourth Amendment jurisprudence." *Id.* at 664 (Rehnquist, J., dissenting).

142. *See* Brown v. Texas, 443 U.S. 47 (1979) (encounter in an alley in an area with a high incidence of drug trafficking).

automobile[143] for purposes of investigation or questioning should be viewed more reasonably as entailing a show of official authority that implicitly conveys an intent to restrict freedom of movement.

The method by which the police officer initiates the encounter clearly is also important. Apart from the relevance of a display of firearms in initiating the contact, common sense dictates that a review must include questions such as whether the officer requested the cooperation of the citizen or whether, instead, he commenced the encounter with a command. The difference between an encounter that begins with an officer's statement, "Sir, may I talk to you a moment?"[144] and one that commences with a police officer's command, such as, "Freeze! Don't move!" or "Stay where you are!"[145] is the difference between a police-citizen encounter that seeks the voluntary cooperation of the citizen and one that easily could contain a show of authority carrying the implicit message that the citizen was not free to ignore the command and walk away.

The nature of the questions asked by an officer during an encounter also may be relevant to the seizure issue. As questioning moves from general questioning concerning facts unrelated to a particular crime or class of crimes to questions indicating the officer's interest in a specific crime or class of crimes,[146] the perception of the citizen reasonably may change from one of a voluntary encounter, from which he is free to disengage, to one of a formal police investigation of specific criminal activity, which he is not free to ignore. Directly related to the relevance of the substance of the inquiry is the relevance of its length. When a police officer prolongs an encounter by asking additional questions or seeking and examining documents or property,[147] the

---

143. *See* United States v. Johnson, 626 F.2d 753 (9th Cir. 1980) (defendant confronted in the doorway of his home by officers with guns drawn); United States v. Beck, 602 F.2d 726 (5th Cir. 1979) (officers pulled alongside defendant's parked vehicle).

144. United States v. Wylie, 569 F.2d 62, 65 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978). *See also* United States v. Burrell, 286 A.2d 845, 845 (D.C. 1972) ("Hold it, sir, could I speak with you a second?").

145. People v. Tebedo, 81 Mich. App. 535, 265 N.W.2d 406 (1978); People v. Chestnut, 51 N.Y.2d 14, 409 N.E.2d 958, *cert. denied*, 449 U.S. 1018 (1980).

146. *See* United States v. Setzer, 654 F.2d 354 (5th Cir. 1981); United States v. Patino, 649 F.2d 724 (9th Cir. 1981); United States v. Robinson, 625 F.2d 1211 (5th Cir. 1980); United States v. Blum, 614 F.2d 537 (6th Cir. 1980).

In *Setzer* the defendant was confronted in the Miami airport by the DEA agent, Paul J. Markonni. One commentator has noted that at least 37 reported appellate decisions concern the activities of Agent Markonni. *See* Greenberg, *Drug Courier Profiles*, Mendenhall *and* Reid: *Analyzing Police Intrusions on Less than Probable Cause*, 19 AM. CRIM. L. REV. 49, 53 n.25 (1981). After Markonni identified himself, he asked the defendant to consent to a body search. When the defendant refused, Markonni asked the defendant why he refused if he was not "carrying." 654 F.2d 354, 356 (5th Cir. 1981). The court found this conduct "disturbing" since it implied that a person who is not engaged in criminal activity should be willing to surrender constitutional rights. *Id.* at 357. The court further held, however, that such "offensive" conduct by law enforcement officials, standing alone, did not render the encounter unconstitutionally "intrusive." *Id.* at 358.

In *Robinson*, another case that concerned Agent Markonni, the defendant was informed that the agent "had reason to believe" the defendant was "carrying." 625 F.2d 1211, 1216 (5th Cir. 1980). The court held that a specific accusation would be a significant circumstance. *Id.* at 1217.

147. *See* United States v. Patino, 649 F.2d 724, 725–26 (9th Cir. 1981). *Patino* represents a paradigmatic voluntary encounter that quickly escalated into a seizure because of the intrusive activities of the law enforcement officials. Following police initiation of the encounter in an airport terminal, which included a display of identification by the officers and an earlier visual examination of her suitcase, which had been checked,

encounter begins to resemble, and reasonably could be perceived as, a formal investigation with the attendant implication that the citizen is not free to terminate it at will. In this connection, examination of the impact of police requests for documents or for permission to search the person or property of the citizen is instructive. Just as the nature and length of the questioning are relevant to how a reasonable person would view an encounter, so too are any officer requests for access to documents[148] (driver's license, airline tickets, and so on) or for the right to search the person or property of the subject.[149] One must acknowledge the practical consideration that the suspect rarely will want to leave when police have possession of his or her property. The premise that leads to this conclusion, however, comes from the idea that as the encounter becomes more intrusive, even though the inquiries are framed in terms of requests rather than commands and the situation otherwise is still ambiguous, the more likely and reasonable is the perception that the officer is engaged in an official investigation of a specific crime or class of crimes that has focused on the citizen. Thus, since the inquiries constitute a formal investigation rather than routine questioning, it is more likely and reasonable for the citizen to conclude that any attempt to ignore the requests or disengage will be met with force.

Finally, police requests or directions to move the location of the initial encounter to a more convenient place also are relevant to the seizure issue. Clearly, an order or command by the officer for the citizen to move, such as a command to take a seat in the squad car, is a show of authority that, although expressed in affirmative terms—"move somewhere"—carries with it the necessary implication that a failure to move, let alone an attempt to walk away, will be met with force.[150] A police request to alter the location of the

---

defendant was asked if she would mind showing her ticket and some identification. The agents informed her early in the conversation that she fit the drug courier profile. She produced identification with the name "Dora Patino." Her airline ticket bore the name "Gloria Restrepo." In justifying the discrepancy, the defendant said that her cousin had made the reservation. The agents explained the problems of drug trafficking in the Miami airport and asked permission to search her handbag. The defendant gave consent and opened the bag. After finding nothing in the handbag, the agents requested consent to search her suitcase. When she asked the reason for the search, she was told that they were looking for narcotics and that she did not have to consent. Defendant refused to allow the search. At that point one of the officers left to summon a narcotics-detecting dog. Questioning continued and the defendant finally was permitted to depart. The agents then went to the baggage area where they arranged a "suitcase lineup." The dog showed little interest in the bag, and the luggage was released. Next, the officers obtained the call-back number for the Restrepo ticket, phoned that number and were told that no one named Restrepo lived there. They then contacted officials in the San Francisco airport, the defendant's destination, and gave those officials the information they had obtained. When the defendant landed she was detained, and her suitcase again was examined by a narcotics-detecting dog. The dog gave a positive response. The defendant finally consented to a search of the bag, and cocaine was discovered. *Id.* at 725–26. The Court held that a seizure had occurred when she was first stopped and asked for her ticket and identification. *Id.* at 727–29.

148. *See, e.g.*, United States v. Lara, 638 F.2d 892 (5th Cir. 1981); United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980); United States v. Bowles, 625 F.2d 526 (5th Cir. 1980).

149. *See, e.g.*, United States v. Setzer, 654 F.2d 354 (5th Cir. 1981); United States v. Hill, 626 F.2d 429 (5th Cir. 1980).

150. In most cases in which an order or command to change the location of an encounter has been given, the courts have assumed that a seizure has occurred. The only question remaining is whether the seizure constituted a stop or an arrest. United States v. Jefferson, 650 F.2d 854 (6th Cir. 1981); United States v. Nieves, 609 F.2d 642 (2d Cir. 1979), *cert. denied sub nom.* Figueroa v. United States, 444 U.S. 1085 (1980); United States v. Esposito, 484 F. Supp. 556 (E.D.N.Y. 1980); United States v. Patino-Zambrano, 482 F. Supp. 245 (E.D.N.Y. 1979). *See infra* text accompanying notes 213–18.

encounter makes the situation more ambiguous.[151] The question whether a seizure has occurred must be answered by considering the perception that such a request is likely to produce in the mind of a reasonable person. If the police request clearly is linked to the investigation of specific criminal activity and that fact is known to the citizen, or if the request is to move the encounter to a police-dominated environment, the action is likely to be viewed as implying that refusal to comply will not be accepted. Thus, a reasonable person probably would perceive requests that he or she return to the scene of a crime so that he or she can be viewed by the victim,[152] or requests that he or she come to the station house or field office for questioning,[153] as commands masked in polite terms. On the other hand, a citizen is less likely to perceive as menacing or threatening requests to move the location of the encounter for the obvious convenience of others (for example, to avoid blocking a sidewalk) or requests to move that constitute only de minimus intrusions.[154]

3. *Absence of Warnings*

Even if the words of the officer initiating the encounter are polite—they clearly convey the impression that the officer is seeking the individual's voluntary cooperation rather than demanding a response to inquiries—questions have been raised about the relevance of the lack of an explicit warning that the individual does not have to respond or cooperate and is free to ignore the request and walk away. The nearly universal response from courts has been that an affirmative warning is not required each time law enforcement officials seek the cooperation of a citizen.[155] Moreover, the absence of such a warning apparently creates no adverse inference and adds nothing to the argument that, under the circumstances, a reasonable person would have viewed the encounter as one that he or she was not free to avoid at will. Courts frequently cite *Schneckloth v. Bustamonte*,[156] and *Miranda v. Arizona*[157] as interpreted in *Oregon v. Mathiason*,[158] to support the conclusion that warnings are not

---

151. The airport search cases, such as *Mendenhall*, normally concern a "request" to alter the location of the encounter. *See generally* United States v. Pulvano, 629 F.2d 1151 (5th Cir. 1980); United States v. Hill, 626 F.2d 429 (5th Cir. 1980).

152. *See* United States v. Short, 570 F.2d 1051 (D.C. Cir. 1978); United States v. Wylie, 569 F.2d 62 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); United States v. Thevis, 469 F. Supp. 490 (D. Conn. 1979), *aff'd*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); Wilkerson v. United States, 427 A.2d 923 (D.C. 1981); Commonwealth v. Lovette, 271 Pa. Super. 250, 413 A.2d 390 (1979).

153. *See* Oregon v. Mathiason, 429 U.S. 492, 493 (1977) (per curiam) (officer asked if the defendant could "meet him at the state patrol office").

154. Whether a police request to relocate an encounter for the obvious convenience of others is menacing or threatening depends, of course, on whether the reason for the request is either clear to the suspect or explained to him. By far the most common order to move occurs when an automobile is stopped and the officer orders the suspect out of the vehicle. The Supreme Court has approved the practice of ordering persons who have been stopped for traffic violations to alight from the vehicle without the necessity of showing a separate justification for the order. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam). *See infra* text accompanying notes 223–24.

155. *See, e.g.*, United States v. Mendenhall, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.). *But see* Royer v. State, 389 So. 2d 1007, 1020 (Fla. Dist. Ct. App. 1980), *cert. granted*, 454 U.S. 1079 (1981).

156. 412 U.S. 218 (1973).

157. 384 U.S. 436 (1966).

158. 429 U.S. 492 (1977) (per curiam).

required.[159] *Schneckloth, Miranda*, and *Mathiason*, of course, deal generally with the question whether an explicit warning of the content of the constitutional rights concerned must be given prior to obtaining a valid waiver thereof. *Schneckloth* held that an explicit warning that an individual has a constitutional right to refuse consent to a search is not required to find that the person freely and voluntarily gave consent.[160] *Mathiason*, interpreting *Miranda*, made it clear that the *Miranda* warnings of the right to remain silent and the right to counsel need not be given to everyone questioned by the police.[161] Initially, *Schneckloth* and *Mathiason* appear to foreclose the argument that the individual has a right, when confronted by police officers seeking his or her cooperation, to be told that he or she is free to ignore the requests and walk away. Upon closer examination, however, it is clear that these cases do not directly preclude the argument that some form of warning should be given.

When a citizen has been confronted by law enforcement officers seeking information, courts tend to view the issue presented as a choice between two possible results: either the person was seized (determined by what a reasonable person would think under the circumstances), or the person was not seized and his or her failure to ignore the officers' questions and walk away arose from a desire (albeit perhaps unconscious) to cooperate. If the circumstances of the encounter demonstrate that no seizure occurred, then the person's continued cooperation (answering questions, producing documents, or remaining in the presence of the investigating officers) is considered a form of consent to the activity or the waiver of a constitutional right. But does the

---

159. *See, e.g.*, United States v. Setzer, 654 F.2d 354 (5th Cir. 1981); United States v. Patino, 649 F.2d 724 (9th Cir. 1981).

160. 412 U.S. 218, 226–27 (1973). In *Schneckloth* the defendant was a passenger in an automobile stopped for a routine traffic infraction. When the driver was unable to produce a license, the officer asked one of the occupants, Joe Alcola, who had indicated earlier that the automobile belonged to his brother, if he could search the car. Alcola replied, "Sure, go ahead." The officer opened the trunk and found stolen checks, which were admitted in evidence at Bustamonte's trial. *Id.* at 22. The Court held that the validity of Alcola's consent to search was to be determined by whether that consent was "voluntarily" given, and in making the determination proof that the person giving consent knew he or she had the right to refuse is simply one circumstance to be taken into account. *Id.* at 226–27. Specifically, the Court held that the government need not advise the person that he or she has the right to refuse consent before eliciting that consent. *Id.* at 231.

161. 429 U.S. 492, 495 (1977). *Miranda* held that warnings must be given prior to "custodial interrogation." Miranda v. Arizona, 384 U.S. 436, 444 (1966). Custodial interrogation was defined as "questioning initiated by law enforcement officials *after* a person has been taken into custody or *otherwise deprived of his freedom of action in any significant way.*" *Id.* (emphasis added). In *Mathiason* the defendant voluntarily met with police officers, at their request, at police headquarters. The defendant was told that he was not under arrest, but the *Miranda* warnings were not given. He then was questioned about his possible involvement in a burglary under investigation. 429 U.S. 492, 493 (1977). The Supreme Court of Oregon suppressed the defendant's statements because it found that the questioning had been conducted in a "coercive atmosphere," a circumstance that, it held, triggered the need for *Miranda* warnings prior to questioning. Oregon v. Mathiason, 549 P.2d 673, 675 (Or. 1976). The United States Supreme Court reversed, holding that the defendant was not in custody or otherwise deprived of his freedom of action in any significant way; hence, *Miranda* was inapplicable. 429 U.S. 492, 495 (1977). *See also* Beckwith v. United States, 425 U.S. 341 (1976) (warnings need not be given simply because the focus of the investigation may have been on the suspect questioned). *But see* Orozco v. Texas, 394 U.S. 324 (1969) (warnings must be given to a person questioned in his own home after arrest); Mathis v. United States, 391 U.S. 1 (1968) (warnings must be given to a prison inmate questioned about involvement in a separate offense).

resolution of the seizure issue entail the same fundamental concerns as those that were before the Court in *Schneckloth*, so that the rationale of that case can be applied properly? In one sense, of course, the analogy is defensible. The individual has a constitutional right to control his or her freedom of movement, and included within that right is the right, when confronted by law enforcement officers seeking information, to ignore the request and walk away.[162] If the individual accedes to these requests for information, the person has consented to be in the presence of the officers and thereby has waived the right to walk away. By the same token, when the police request permission to search an individual or his or her property, that person has the right to refuse consent. If he or she agrees to allow the officer to conduct the search, the person has consented and thereby has waived a constitutional right. *Schneckloth* held that the validity of the consent (the waiver) did not turn on proof that the individual knew he or she had the right to refuse permission to search;[163] that is, *Schneckloth* held that no constitutional requirement exists, in the form of a prerequisite to finding a valid waiver of fourth amendment rights, that the person be informed that he or she has a right to refuse consent.[164]

In another sense, however, the reasoning in *Schneckloth* is inapposite when applied to situations containing alleged waivers in police-citizen encounters. In most of these cases the question is whether, under all the circumstances, a seizure occurred. Because the situation normally is ambiguous, the question is resolved by determining how a reasonable person would view the encounter; that is, the issue is whether a reasonable person would have believed, under the circumstances, that he or she was not free to leave or to ignore the requests made by law enforcement officers. The issue is not what the individual subjectively believed or intended; under the prevailing test, subjective belief that he or she was not free to leave is irrelevant.[165] The question presented in the seizure cases is whether the person actually consented to the encounter, determined on the basis of what a reasonable person would have thought, and not whether the consent was free and voluntary (valid consent), which was the question in *Schneckloth*. The conclusion that the person consented to the encounter is merely a finding that necessarily is reached when a court determines, applying the reasonable person test, that the police officers did not deprive the individual of his or her liberty or freedom of movement. A statement that the person was free to leave clearly would be relevant to the resolution of this question. While it may not be necessary, to secure a free and voluntary (valid) consent, to warn the person that he or she is free to ignore an inquiry, it is quite another matter to say that such a warning is not appropriate when the question is whether the actions of

162. Terry v. Ohio, 392 U.S. 1, 32–33 (1968) (Harlan, J., concurring).
163. *See supra* text accompanying note 160.
164. *Id.*
165. *See supra* text accompanying notes 110–14.

the police, viewed from the perspective of a reasonable person, constituted a deprivation of freedom of movement—that is, whether the person actually consented to the encounter. To impose such a requirement would not be inconsistent with *Schneckloth* and would go a long way toward achieving a workable and definite standard to resolve what is otherwise a very difficult factual question.

The relevance of *Miranda* and *Mathiason* to the resolution of the seizure question also is questionable. *Miranda* and its progeny hold that an individual in custody (a person deprived of his freedom of movement in a significant way[166]) must be warned of his right to remain silent and his right to counsel prior to police questioning. If the person is not in custody, no warning of the right to remain silent need be given.[167] When a police officer initiates an encounter with a citizen that includes requests for information, the *Miranda* warning need not be given if the person is not in custody or otherwise deprived of his or her freedom of movement in a significant way.[168] *Miranda*, of course, is based on the premise that the inherently compelling nature of custodial interrogation requires a specific warning to the individual to ensure that the constitutional right to remain silent is safeguarded properly.[169] In the absence of custody no similar warning is required, since the compelling circumstances are not present. To argue that *Miranda* warnings need not be given in every police-citizen encounter because, in the absence of custody, the compulsion to speak is not present, does not, however, respond to the question whether a seizure occurred. When the issue is whether, under the circumstances, a seizure occurred, a relevant question would be whether the person was told that he or she did not need to respond. *Miranda* warnings were designed to dissipate the compulsion inherent in custodial interrogation situations; just because the factual predicate (custody) is lacking does not mean that a similar warning should not be given, for entirely different reasons, to aid in the resolution of an entirely different problem. *Miranda* determines the lawful use of statements obtained by determining whether or not the person was in custody, but neither the holding nor the logic of *Miranda* helps resolve the fourth amendment issue of whether, under the circumstances, a seizure occurred.

Admittedly, the reasoning of *Miranda* is not related directly to the resolution of the seizure issue. Furthermore, *Miranda* does not require warnings of the right to remain silent in every police-citizen encounter for the defendant's statements to be admissible. To impose such a requirement to clarify the intent of the police (and, hence, the perception of a reasonable person), however, would not be inconsistent with *Miranda*. A warning requirement would help to resolve the ambiguity in most police-citizen encounters concerning

166. *See supra* note 161.
167. Miranda v. Arizona, 384 U.S. 436, 467–68 (1966).
168. *Id.* at 478–79.
169. *Id.* at 457–58.

whether the person is free to ignore the requests for information (the seizure issue).

The position that warnings, whether in the form of the right to remain silent or of a more general warning that the person is free to walk away, are not required in every police-citizen encounter is supported by the holdings in *Schneckloth* and *Miranda*. The circumstances and constitutional concerns that produced those decisions, however, are distinguishable. Thus, to hold that some form of warning is required whenever the police seek the cooperation of an individual suspected of criminal activity is not inconsistent with either case. The justification for warnings would not be that they were required to make the waiver free and voluntary or to dissipate the compelling nature of the environment. Instead, the requirement of warnings would be justified on the grounds that warnings would make the seizure issue easier to resolve and that they would protect more adequately the fourth amendment rights. The latter justification is based upon the premise proffered by Professor LaFave that in most police-citizen encounters it is simply unrealistic to assume that individuals will believe that they are free to ignore an officer's requests and walk away.[170]

The conclusion should be obvious that no single, definite standard exists by which to evaluate when a police-citizen encounter becomes a seizure, especially when neither actual force (including a show of arms) nor physical obstruction occurs. Professor LaFave undoubtedly is correct when he argues that a realistic appraisal of the probable response of an individual who is confronted by law enforcement officials seeking information always will be that he or she is not free to ignore the officers and walk away. Professor LaFave has suggested, therefore, that the focus should be on whether the conduct of the officers went beyond that which normally is acceptable in social intercourse among individuals. This standard should be determined by considering the "menacing" nature of the officer's conduct or words.[171] It is unclear what Professor LaFave had in mind by the choice of the word "menacing" to describe the limit on an officer's authority to seek the voluntary cooperation of citizens.[172] If he intended that the word connote a rude or threatening activity, in which the citizen would be offended or reasonably might anticipate physical harm or the use of physical force, the standard is misguided. Why social amenities should govern fourth amendment standards is difficult to understand; and clearly a seizure can occur without the use or

170. *See supra* text accompanying note 53. *See also* Greenberg, *Drug Courier Profiles*, Mendenhall *and* Reid: *Analyzing Police Intrusions on Less than Probable Cause*, 19 AM. CRIM. L. REV. 49, 76 (1981) ("[W]arning[s] would not only help to ensure the voluntariness of consent but would also help streamline the evidentiary problems inherent in its proof.").

171. LAFAVE, SEARCH, *supra* note 53, § 9.2(g), at 53–54. *See supra* text accompanying notes 108–109.

172. Professor LaFave suggests that the "critical inquiry would be whether the policeman, although perhaps making inquiries which a private citizen would not be expected to make, has otherwise conducted himself in a manner consistent with what would be viewed as a nonoffensive contact if it occurred between two ordinary citizens." LAFAVE, SEARCH, *supra* note 53, § 9.2(g), at 53.

threat of force.[173] If, however, Professor LaFave used the word "menacing" to describe activities which indicate that the encounter is simply the first step toward arrest and prosecution—threatening the full force of the law—then it is much closer to the mark. In the absence of actual physical restraints or unequivocal verbal commands, a reasonable person examining the conduct of the officer is more likely to view the circumstances as a seizure when the conduct or verbal activities of the police become intrusive, that is, when they clearly are related to the investigation of specific criminal acts. It is the threat of arrest and prosecution that produces the perception of restricted liberty in a police-citizen encounter, and that perception is more likely to arise when conduct of the police is linked to the investigation of specific criminal activity.

III. THE CONCEPTS OF "STOP" AND "ARREST"

The dimensions of the constitutional term "seizure," as noted in the introduction, are greater than a simple definition of the circumstances that constitute a seizure and those that do not. The Supreme Court has developed a two-tier analysis of fourth amendment protections, which provides that the legality of a seizure will be evaluated (at least in part) to determine its reasonableness under the circumstances[174] by balancing the intrusiveness of the activity against the legitimacy or compelling nature of the law enforcement interest at stake. The Court has sanctioned the use of the terms "stop" and "arrest" to describe the two categories of seizure.[175]

The previous section discussed the proper method of dealing with the question whether a seizure had occurred. Assuming that the answer to that question is affirmative in a given case, another equally difficult question must be resolved: Was the seizure a "stop" or an "arrest"? By definition, all stops and all arrests are seizures, and, therefore, they must be justified by some level

---

173. *See supra* text accompanying notes 129–40.

174. Terry v. Ohio, 392 U.S. 1 (1968), generally is thought to be the first case in which the Court authorized a seizure on less than probable cause based upon a weighing of the interest in effective law enforcement against the intrusion on personal liberty. *Terry* upheld the reasonableness of the encounter by "balancing the need to search [or seize] against the invasion which the search [or seizure] entails." *Id.* at 21. *Terry*, however, was concerned primarily with the right of the officer to conduct a limited search (frisk) of a person suspected of criminal activity, and the Court merely assumed, without necessarily deciding, that the fourth amendment does not prohibit forcible stops based upon reasonable suspicion. *Id.* at 32–33 (Harlan, J., concurring).

In Adams v. Williams, 407 U.S. 143 (1972), the Court made explicit what was implicit in *Terry*: "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Id.* at 146.

In Dunaway v. New York, 442 U.S. 200 (1979), the Court reaffirmed that the process of balancing may validate some seizures that are significantly less intrusive than an arrest. The Court in *Dunaway*, describing the holding of *Terry*, argued that when the intrusion on the citizen's rights "was so much less severe" than that contained in a traditional arrest, the opposing interests in crime prevention and detection and in the police officer's safety could support the seizure as reasonable. *Id.* at 209.

Finally, in Michigan v. Summers, 452 U.S. 692 (1981), the Court held that some seizures admittedly covered by the fourth amendment constitute such "limited intrusions on the personal security of those detained and are justified by such substantial governmental interests that they may be made on less than probable cause . . . ." *Id.* at 699. The balancing process has been criticized. *See* Bacigal, *The Fourth Amendment in Flux: The Rise and Fall of Probable Cause*, 1979 U. ILL. L.F. 763.

175. *See* Terry v. Ohio, 392 U.S. 1, 10 (1968).

of certainty regarding the suspect's participation in criminal activity.[176] The level of certainty required, however, will vary depending upon whether the seizure is characterized as a stop or as an arrest. Under current case law a stop is justified when the police possess a "particularized and objective basis for suspecting the particular person stopped of criminal activity."[177] An arrest, on the other hand, requires a greater quantum and quality of information—probable cause to believe that the suspect has committed a crime—than that required for a stop.[178]

The intrusiveness of the seizure distinguishes between a stop and an arrest.[179] As the intrusiveness of the seizure increases, the reasonableness standard of the fourth amendment demands that the justification supporting the seizure also increase. But how do we evaluate the intrusiveness of the seizure to characterize it as either a stop or an arrest? Unlike the seizure issue, the Supreme Court has had the opportunity to develop some definite standards, although not all the questions have vet been resolved.

A. *General Considerations*

In *Adams v. Williams*,[180] building on its earlier decision in *Terry v. Ohio*,[181] the Supreme Court stated that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."[182] Instead, the Court held in *Adams* that a "brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information," will be permitted if a reasonable suspicion exists that the individual is, or is about to be, engaged in criminal activity.[183] The Court reasoned that while this activity would be characterized as a seizure, this narrowly drawn authority would be deemed reasonable under the fourth amendment in view of the limited nature of the intrusion and the substantial societal interest in effective law enforcement.[184] The limited nature of the intrusions sanctioned by *Terry* and its progeny, of course, referred to the greater intrusion in the nature of a "trip to the stationhouse and prosecution for crime—'arrest' in traditional terminology."[185] The rationale of *Terry* has been applied to a variety of cir-

176. *Id.*

177. *See supra* notes 22 & 27–30 and accompanying text.

178. *Id.*

179. *Id.*

180. 407 U.S. 143 (1972).

181. 392 U.S. 1 (1968).

182. 407 U.S. 143, 145 (1972). In *Adams* the police officer received a tip from an informant that an individual seated in a nearby automobile was carrying narcotics and had a gun at his waist. The officer approached the vehicle, tapped on the window, and asked the occupant to open the door. When the suspect rolled down the window instead, the officer reached in and removed a gun from the suspect's waistband. *Id.* at 144–45.

183. *Id.* at 146.

184. Terry v. Ohio, 392 U.S. 1, 27 (1968). *See supra* text accompanying note 173.

185. Terry v. Ohio, 392 U.S. 1, 16 (1968). The Court never has specifically defined the term "arrest." In *Terry*, however, the Court did make the following statement: "An arrest is the initial stage of a criminal

cumstances other than the fortuitous street encounter between policeman and citizen, but the basic premise and rationale has remained the same: an officer may make a brief stop of a suspicious individual to determine his identity or to maintain the status quo while obtaining more information if he has a particularized and objective basis for suspecting that person of criminal activity. Thus, under the narrow authority granted by *Terry* and with the requisite reasonable suspicion, the Court has authorized not only a limited, on-the-street stop and frisk for weapons,[186] but also border patrol stops,[187] limited to a short period of detention and including a brief question or two, to check for illegal aliens. In addition, by analogy to the reasoning in *Terry*, the Court has authorized a police officer to order the driver of a vehicle to get out of the automobile following a lawful stop for a traffic violation because the intrusion is de minimus.[188] Also by analogy to the authority conferred by *Terry*, the Supreme Court has given law enforcement officials the authority to detain, for the duration of the search, the occupants of premises being searched under the authority of a search warrant.[189]

On the other hand, the Court has held, subsequent to *Terry*, that the concept of arrest is not limited to cases in which the police inform a suspect that he is "under arrest," at least as that term is used to indicate the traditional trip to the station house and the formal commencement of a criminal prosecution.[190] In other words, the concept of "stop" is not broad enough to cover all detentions short of a formal arrest; specifically, it does not authorize extensive detention for purposes of investigation.[191]

The Supreme Court on two occasions has rejected attempts to extend *Terry* to cases that contained a significant detention for investigative purposes. The first case, *Davis v. Mississippi*,[192] was decided one year after *Terry*. In *Davis* the police had picked up the accused and transported him to the police station, where he was questioned briefly and fingerprinted. The State conceded that it lacked probable cause for the detention and did not claim that the defendant had voluntarily accompanied the police to the station. Nine days later, the police again detained the defendant without probable cause and obtained a second set of prints. The State argued that the detention "was of a type which does not require probable cause" because it occurred at the "investigative" rather than the "accusatory" stage, and because it was for the limited purpose of obtaining fingerprints.[193] The Court

---

prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows." *Id.* at 26.

186. Adams v. Williams, 407 U.S. 143 (1972).

187. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

188. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam). *See infra* text accompanying notes 223–24.

189. Michigan v. Summers, 452 U.S. 692 (1981). *See infra* text accompanying notes 220–21.

190. Dunaway v. New York, 442 U.S. 200 (1979).

191. *Id.*

192. 394 U.S. 721 (1969).

193. *Id.* at 726. The defendant was one of twenty-four black youths brought in and held briefly for questioning and fingerprinting. *Id.* at 722. Following his release the defendant was interrogated on several other

rejected the argument that the investigative character of the activity should be controlling. The Court further stated that "to argue that the Fourth Amendment does not apply to the investigatory stage is fundamentally to misconceive the purposes of the Fourth Amendment" and that "[n]othing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed 'arrests' or 'investigatory detentions.'"[194]

The second case, *Dunaway v. New York*,[195] contained similar facts. In *Dunaway* the police picked up the defendant during a murder investigation and took him to police headquarters for questioning. Although the defendant was not informed at the time that he was under arrest, he would have been physically restrained had he attempted to leave.[196] Thus, there was no question in *Dunaway* that the defendant was seized within the meaning of the fourth amendment. The State also conceded that at the time of the seizure, the police lacked probable cause to arrest. The Government argued, instead, that the defendant was not under arrest at the time and, thus, the detention was permissible because the police did have reasonable suspicion of his participation in the crime under investigation.[197] The Court refused to extend the narrow authority conferred by *Terry* to a seizure as intrusive as this and argued that the extension of the rationale of *Terry* to this situation would "threaten to swallow the general rule that . . . seizures are 'reasonable' only if based on probable cause."[198]

The reasoning of *Dunaway* is critical to an analysis of the constitutional distinction between the narrow "stop" authority conferred by *Terry* and its progeny and an arrest. In effect, *Dunaway* held that the concept of "stop" is a narrow grant of authority, and that all other seizures—those in which the intrusion goes beyond the authority recognized by *Terry* and related cases—constitute "arrests" even though they may not necessarily constitute an "arrest" as that term traditionally is used. "Arrest," in other words, becomes a term of art describing all seizures that include an intrusion on personal liberty greater than that conferred under the authority of a stop. In *Dunaway* the Court described the *Terry* stop as a limited, on-the-street frisk for weapons[199] and described *Brignoni-Ponce* as an application of *Terry* to the special

---

occasions, sometimes in his home or car, other times at police headquarters. Nine days after the initial detention, the defendant again was taken in and held overnight for questioning. The next day he signed a statement, but the statement was not introduced at trial. Two days later, while still in jail, he was fingerprinted again. These prints were sent to the FBI for analysis and were found to match those taken at the scene of the crime. *Id.* at 723.

194. *Id.* at 726–27.

195. 442 U.S. 200 (1979).

196. *Id.* at 203. An informant had implicated the defendant in the crime, but the information supplied was insufficient to get a warrant. Nevertheless, the investigating officers ordered other officers to pick him up and bring him in. *Id.*

197. *Id.* at 206. The Court did not decide whether the officers had reasonable suspicion within the meaning of *Terry*. Instead, it concluded that the nature of the detention went far beyond that authorized by *Terry* and its progeny and, thus, had to be supported by probable cause. *Id.* at 212–13.

198. *Id.* at 213.

199. *Id.* at 209.

context of roving border patrols that stop automobiles to check for illegal aliens. These stops usually consume "less than a minute" and entail "a brief question or two."[200] The Court contrasted the facts in *Terry* and *Brignoni-Ponce* with those in *Dunaway*:

> Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. . . . The mere facts that petitioner was not told he was under arrest, was not "booked," and would not have had an arrest record if the interrogation had proved fruitless, while not insignificant for all purposes, . . . obviously do not make petitioner's seizure even roughly analogous to the narrowly defined intrusions involved in *Terry* and its progeny.[201]

Several conclusions may be drawn from *Davis* and *Dunaway*. First the authority conferred under *Terry* does not legitimize under the fourth amendment a species of investigative detention. Second, the concept of "stop" has both temporal and spatial qualities that are related directly to the intrusiveness of the seizure. Since a stop is a seizure within the meaning of the fourth amendment, although reasonable only when based upon reasonable suspicion, it assumes authority to enforce the restriction of liberty or freedom of movement entailed therein. The authority that is conferred, however, is limited by the length of time the deprivation may continue and by the location to which the officer may move the encounter. Finally, *Dunaway* and *Davis* both suggest that the intrusiveness of a seizure in respects other than time and location is a circumstance to be considered. In *Davis* the Government had argued that the seizure was reasonable because it was for the limited purpose of obtaining fingerprints. The Court rejected that argument because the defendant had been interrogated and fingerprinted, but the Court intimated that a "narrowly circumscribed procedure for obtaining fingerprints of suspects without probable cause" might be permissible under the fourth amendment.[202]

---

200. *Id.* at 210–11.

201. *Id.* at 212. Justice Rehnquist dissented in an opinion joined by the Chief Justice. *Id.* at 221. Justice Rehnquist argued that the defendant had voluntarily accompanied the officers to the station house for questioning. *Id.* at 223–25. Moreover, assuming that an illegal seizure had occurred, he argued that a sufficient period of time had lapsed between the seizure and the confession to render the confession admissible. *Id.* at 225–27.

202. Davis v. Mississippi, 394 U.S. 721, 728 (1969). Following the *Davis* decision the Judicial Conference of the United States proposed an amendment to the Federal Rules of Criminal Procedure that provided a process by which a federal magistrate could order a suspect to appear for nontestimonial identification proceedings, such as giving fingerprint exemplars, even though probable cause to arrest was lacking. *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 52 F.R.D. 409 (1971). The proposal never was adopted. *See* REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 46–47 (1972). Similar proposals have been made by other organizations. ABA STANDARDS RELATING TO DISCOVERY AND PROCEDURE BEFORE TRIAL § 3.1 (Approved Draft 1970); MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 170.1-.7 (1975). For an analysis of the various proposals, see MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 170.1-7, commentary at 459–89 (1975). *See also* Note, *Detention to Obtain Physical Evidence Without Probable Cause: Proposed Rule 41.1 of the Federal Rules of Criminal Procedure*, 72 COLUM. L. REV. 712 (1972); Note, *Proposed Federal Rule of Criminal Procedure 41.1*, 56 MINN. L. REV. 667 (1972).

These proposals all provided for the participation of an independent magistrate in the decision to require the suspect to appear. While the process still would constitute a deprivation of liberty, the participation of the independent magistrate would eliminate some of the potential for abuse and weaken the fourth amendment

In *Dunaway* the Court reaffirmed the principle that the purposes of the seizure—considerations other than the length and location thereof—may be relevant to the inquiry. The Court stated that "detention for custodial interrogation—regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest."[203]

Apart from the major areas of concern—the temporal and spatial scope of the seizure and the purposes and other general characteristics of the encounter—the cases in the lower federal courts and in the state courts identify a myriad of other relevant problems, some of which were described above as relevant to the seizure issue, but which may be relevant also to the question whether the seizure was a stop or an arrest. These include: First, the question from whose perspective the circumstances of the seizure are to be evaluated—that is, the intent of the officer, the subjective belief of the person seized, or the subjective belief of a reasonable person; second, the relevance of the degree of force used or displayed to effectuate the encounter; and third, the question whether a statement by the officer that the individual is under arrest precludes a finding that the seizure was a stop when the circumstances otherwise would dictate such a finding.

B. *Temporal and Spatial Considerations and General "Intrusiveness" Concerns*

In both *Dunaway* and *Davis* the police seized a suspect and transported him to the station house for investigative purposes. In neither case was the suspect informed that he was under arrest. In *Davis* the suspect was held for a short period while he was fingerprinted and briefly questioned before being released. In *Dunaway* the suspect was detained at police headquarters for over an hour before he made statements and drew sketches that incriminated him. In *Dunaway*, especially, both the length of the detention and its location greatly influenced the Court's finding that the seizure was an arrest and, accordingly, had to be supported by probable cause (which was lacking at the time of the initial seizure). *Adams* and *Brignoni-Ponce* also emphasized the importance of the temporal and spatial qualities of the detention. *Adams* authorized a "brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information . . . ."[204] *Brignoni-Ponce* authorized border patrol agents to stop "car[s] briefly and [to] investigate the circumstances that provoke suspicion."[205]

---

objection. *Cf.* United States v. Dionisio, 410 U.S. 1, 9 (1973) ("[A] subpoena to appear before a grand jury [to provide voice exemplars] is not a 'seizure' in the Fourth Amendment sense."). *See infra* text accompanying note 247.

203. 442 U.S. 200, 216 (1979).

204. Adams v. Williams, 407 U.S. 143, 146 (1972). *See supra* text accompanying note 183.

205. United States v. Brignoni-Ponce, 422 U.S. 873, 881 (1975). *See supra* text accompanying notes 87–89. The Court utilized the balancing methodology to uphold a roving border patrol stop made upon reasonable

The temporal and spatial scope of the seizure is relevant to the intrusiveness issue for a number of reasons. First, as the length of the forced detention increases, the associated inconvenience and public stigma also necessarily increase.[206] Second, and more important, as the length of the forced detention increases, or as its spatial scope changes, the government will have a greater opportunity to exploit a police-dominated environment to obtain information. Third, at least in some circumstances a change in location will give the police an opportunity to obtain information in plain view or to obtain incriminating evidence, such as eyewitness identification testimony,[207] in other ways.

In sum, the temporal and spatial scope of the detention should influence the decision to characterize a seizure as a stop or as an arrest for two reasons. First, as an abstract, philosophical notion, a lengthy or unlimited assertion of government authority to control a citizen's freedom of movement represents in itself a substantial intrusion on individual freedom. Second, such an assertion may enhance evidence-gathering objectives that, in a general sense, constitute an additional significant invasion of privacy.

The length of the encounter alone has been held sufficient to characterize a seizure as an arrest.[208] Unfortunately, little consensus appears to exist among courts on how long an individual may be detained (or stopped) before the seizure becomes an arrest. However, most courts clearly treat the brief stop authorized by *Terry* and its progeny as authority that confers a right to detain which is limited by minutes rather than hours. Thus, a detention for a "couple of minutes"[209] or for a "short time"[210] has been approved. Other courts have found the time lapse sufficient to turn the seizure into an arrest when the detention lasted only fifteen minutes.[211] The relevance of the length of the detention to the resolution of the question was aptly described by the Fourth Circuit in a recent opinion: "We cannot overemphasize the impor-

---

suspicion. The Court noted the strong public interest in excluding illegal aliens and the difficult problems associated with patrolling the two-thousand-mile border with Mexico. *Id.* at 882–83. By contrast, the intrusion on personal liberty was found to be modest because the duration of the stop seldom exceeded one minute. *Id.* at 880. *See also supra* text accompanying note 174.

206. *See supra* text accompanying notes 16–18.

207. *See supra* text accompanying notes 37–41.

208. *See, e.g.*, Sharpe v. United States, 660 F.2d 967, 970 (4th Cir. 1981), *vacated and remanded on other grounds*, 102 S. Ct. 2951 (1982); United States v. Patterson, 648 F.2d 625, 632 (9th Cir. 1981); United States v. Chamberlin, 644 F.2d 1262, 1266 (9th Cir. 1980), *cert. denied*, 453 U.S. 914 (1981).

209. United States v. Vasquez-Santiago, 602 F.2d 1069, 1073 (2d Cir. 1979), *cert. denied*, 447 U.S. 911 (1980) (detention for a couple of minutes did not transform a stop into an arrest).

210. United States v. Patterson, 648 F.2d 625, 632 (9th Cir. 1981).

211. United States v. Miller, 546 F.2d 251 (8th Cir. 1976) (fifteen-minute seizure while home was searched held unconstitutional because detention was longer than necessary under the circumstances). *See also* Sharpe v. United States, 660 F.2d 967, 970–71 (4th Cir. 1981)(detention for 30–40 minutes sufficient to turn detention into de facto arrest), *vacated and remanded on other grounds*, 102 S. Ct. 2951 (1982); United States v. Chamberlin, 644 F.2d 1262, 1266–67 (9th Cir. 1980) (detention for 20 minutes found unlawful), *cert. denied*, 453 U.S. 914 (1981); United States v. Perez-Esparza, 609 F.2d 1284, 1290–91 (9th Cir. 1979) (three-hour detention at border unlawful in absence of probable cause); United States v. Kennedy, 573 F.2d 657, 660 (9th Cir. 1978) (45-minute detention unlawful under the circumstances); United States v. Jennings, 468 F.2d 111, App. 231, 244 S.E.2d 346, 354 (1978) (40-minute detention unlawful under the circumstances); Radowick v. States, 145 Ga. 115 (9th Cir. 1972) (continuation of detention for 25 minutes unlawful under the circumstances).

tance of brevity for investigatory stops . . . indeed, it is the transitory nature of the stop that justifies the elimination of the probable cause requirement."[212]

The scope of authority conferred under the *Terry* stop doctrine to require people to move to another location also has proved troublesome to the courts. The argument can be made that when the government is permitted to effectuate a change in the spatial circumstances of a detention, the infringement on individual liberty necessarily increases. Thus, the form of brief detention for investigation authorized by *Terry* and its progeny would be incompatible with an order to move to another location—except, perhaps, when the original location constitutes an impediment to the orderly movement of others in the area.[213] One could argue that once the government asserts the authority to control a person's movement by a positive order to move, the deprivation of liberty is at its zenith. Certainly, a qualitative difference exists between the assertion of government power to detain an individual at the location that a person voluntarily accepted and the assertion of government power to force the individual to move to another location. The lower courts, however, have for the most part refused to hold that to mandate a change in the location of a seizure is inherently inconsistent with the authority conferred by *Terry* and its progeny;[214] that is, the seizure will not be transformed into an arrest simply because the officer required the individual to get out of his automobile[215] or to get into the police cruiser,[216] or to return to the location from which he or she just came.[217] The airport seizure cases, such as *Mendenhall*, constitute a class

---

212. Sharpe v. United States, 660 F.2d 967, 970 (4th Cir. 1981), *vacated and remanded on other grounds*, 102 S. Ct. 2951 (1982).

There is substantial support, however, for the position that the length of the detention, standing alone, should not be outcome determinative. Professor LaFave has argued that the primary focus of the inquiry should be whether the police are pursuing a means of investigation that is likely to resolve the matter one way or another very soon and whether it is essential to the inquiry that the suspect remain present. LAFAVE, SEARCH, *supra* note 53, § 9.2(f), at 40.

Some courts have suggested that the nature of the offense under investigation and the other circumstances of the detention are relevant to the question whether the length of the detention was excessive. *See* State v. Merklein, 388 So. 2d 218, 219 (Fla. Dist. Ct. App. 1980).

213. United States v. Post, 607 F.2d 847, 851 (9th Cir. 1979) (stop does not become an arrest just because officer directs that questioning take place in a less public place); United States v. Oats, 560 F.2d 45, 57 (2d Cir. 1977) (nothing wrong with moving the location of the detention to a place "more convenient" for questioning and "more conducive" to ensuring the safety of the officers).

214. *See, e.g.*, United States v. White, 648 F.2d 29, 37 (D.C. Cir. 1981); United States v. Chatman, 573 F.2d 565, 567 (9th Cir. 1977).

215. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (per curiam). *See infra* text accompanying notes 223–24. Although *Mimms* concerned an order to alight following a routine traffic stop, the rationale has been extended to circumstances in which the reasonable suspicion that prompted the detention was for nontraffic offenses. United States v. Patterson, 648 F.2d 625 (9th Cir. 1981); United States v. White, 648 F.2d 29 (D.C. Cir. 1981). *See generally* Comment, *Orders to Alight: Opening the Door to a New Traffic Stop and Search and Seizure Rule*, 15 U.C.D. L. REV. 171, 179–83 (1981).

216. *See, e.g.*, Sharpe v. United States, 660 F.2d 967 (4th Cir. 1981), *vacated and remanded on other grounds*, 102 S. Ct. 2951 (1982); United States v. Moore, 638 F.2d 1171 (9th Cir. 1980), *cert. denied*, 449 U.S. 1113 (1981).

217. Michigan v. Summers, 452 U.S. 692, 703–05 (1981). *See infra* text accompanying notes 220–21. *See also* United States v. Miller, 589 F.2d 1117, 1127 (1st Cir. 1978), *cert. denied*, 440 U.S. 958 (1979); United States v. Wylie, 569 F.2d 62, 69–71 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); United States v. Patino-

of cases in which the government frequently seeks to alter the location of the detention.[218] The dissenting Justices in *Mendenhall* argued that when the agents escorted the defendant from the public area of the terminal to the DEA office a short distance away, the deprivation was of the same character as that in *Dunaway*, and probable cause was required to support that intrusion.[219]

While the forcible trip to the station house such as that in *Dunaway* and *Davis* clearly may be incompatible with the authority conferred by *Terry*, other Supreme Court cases appear to accept some limited authority to order the movement of persons briefly detained under the authority of *Terry*. In *Michigan v. Summers*[220] the seizure occurred as the suspect was descending the front steps of his home. He then was ordered to return to the premises and remain there while a search was conducted. The Court characterized that seizure as substantially less intrusive than an arrest. The Court found that the circumstances of the seizure were no more intrusive than the detention of the other occupants found inside.[221] In *United States v. Martinez-Fuerte*[222] the Court held that a selective referral to a secondary inspection station of automobiles stopped at a fixed checkpoint constituted a "minimal" intrusion and, thus, created no fourth amendment problem beyond that inherent in the original stop. Finally, in *Pennsylvania v. Mimms*[223] the Court upheld the right of the police to order a suspect who had been lawfully stopped for a traffic violation to get out of the vehicle. The Court found that the additional intrusion occasioned by the order to leave the automobile was de minimus and argued that the order was neither a "serious intrusion upon the sanctity of the person" nor significant enough to rise to the level of a "petty indignity."[224] While in all three cases the forcible movement ultimately aided in the discovery of evidence that led to a successful prosecution, in none of the cases was the change in the location itself clearly designed to enhance evidence-gathering objectives. Instead, in each of these cases the forcible movement

---

Zaibrano, 482 F. Supp. 245, 252 (E.D.N.Y. 1979), *aff'd*, 633 F.2d 208 (1980); United States v. Thevis, 469 F. Supp. 490, 501–02 (D. Conn.), *aff'd*, 614 F.2d 1293 (2d Cir. 1979), *cert. denied*, 446 U.S. 908 (1980); Wilkerson v. United States, 427 A.2d 923, 925–26 (D.C. 1981).

218. *See supra* note 151.

219. United States v. Mendenhall, 446 U.S. 544, 574–75 (1980) (White, J., dissenting).

220. 452 U.S. 692 (1981). The lawfulness of the detention in *Summers* was significant because contraband was discovered during the course of the search. Once it was determined that the defendant owned the premises, he was arrested and searched incident thereto. The heroin found in his pocket was introduced as evidence at trial. *Id.* at 693 n.1.

221. *Id.* at 702 n.16. Seven other persons were present at the time.

222. 428 U.S. 543 (1976). *Martinez-Fuerte* concerned a fixed checkpoint away from the border, at which all vehicles were halted for questioning regarding the possible presence of illegal aliens in the automobile. A relatively small number of vehicles then were referred to a secondary area for further questioning. *Id.* at 546. The defendants in *Martinez-Fuerte* were sent to the secondary inspection station, and further questioning revealed that illegal aliens were in the vehicle. *Id.* at 547.

223. 434 U.S. 106 (1977) (per curiam). The lawfulness of the order to alight in *Mimms* was significant because when the defendant stepped out of the vehicle, the officer noticed a large bulge under the defendant's sports jacket. Fearing that the bulge might be a weapon, the officer frisked the defendant and found a loaded revolver. The defendant was convicted of carrying a concealed weapon and carrying a firearm without a license. *Id.* at 107.

224. *Id.* at 111.

was slight, and each had a plausible justification other than use of the detention itself as a bootstrap for collateral evidence-gathering objectives.[225]

While a lengthy period of detention and the ability of the government to order forcible movement of a suspect in themselves constitute significant intrusions on individual liberty and may, without more, be sufficient to require a finding that a seizure was an arrest rather than a stop, the intrusiveness of a seizure—and hence the degree of infringement on fourth amendment rights—also may be determined by the purposes or other characteristics of the detention. Both *Davis* and *Dunaway* suggest that the intrusiveness of a seizure should be evaluated, in part, with reference to the extent to which the police use the occasion to pursue collateral evidence-gathering objectives.[226] More recently, in *Summers* the Court confirmed the relevance of characteristics of the detention other than its mere length and spatial scope. In *Summers* the Court upheld the right of police to detain the occupants of a dwelling during the period necessary to execute a search warrant.[227] The mere connection of an occupant to the home that was searched provided the "identifiable and certain basis for determining that suspicion of criminal activity" justified the detention.[228] The characterization of the detention as a *Terry* stop rather than as an arrest was supported, in part, by the Court's observation that this "type of detention . . . is not likely to be exploited by the officer or unduly prolonged to gain more information, because the information the officers seek normally will be obtained through the search and not through the detention."[229] Finally, the Court also noted that "because the detention . . . was in [the suspect's] own residence, it could add only minimally to the public stigma associated with the search itself and would involve neither the inconvenience nor the indignity associated with a compelled visit to the police station."[230] *Dunaway* was described by the Court in *Summers* as a seizure "designed to provide an opportunity for interrogation," whereas the detention in *Summers* was "not likely to have the coercive aspects likely to induce self-incrimination."[231]

---

225. The Court described the purposes of the detention in *Summers* as follows: To prevent flight in the event that incriminating evidence was found; to protect the safety of the officers executing the warrant; and to facilitate the search (*i.e.*, to open locked doors and closed containers to avoid delay and damage). 452 U.S. 692, 702–03 (1981). The Court found that the selective referral to the secondary inspection station in *Martinez-Fuerte* minimized the intrusion on the general public because it eliminated the necessity of questioning the occupants of every car. 428 U.S. 543, 560 (1976). Finally, the order to alight approved by *Mimms* was necessary to establish a face-to-face confrontation, which diminished the possibility that the driver could make unobserved movements that might increase the likelihood of assault on the officer. 434 U.S. 106, 110 (1977) (per curiam).

226. *See supra* text accompanying notes 192–201.

227. 452 U.S. 692, 705 (1981).

228. *Id.* at 703–04. The defendant was one of seven persons present at the time the search warrant was executed. How the defendant's mere presence at the scene, along with others, constituted "articulable and individualized" suspicion never was explained. *See* Greenberg, *Drug Courier Profiles*, Mendenhall *and* Reid: *Analyzing Police Intrusions on Less than Probable Cause*, 19 AM. CRIM. L. REV. 49, 72 (1981).

229. 452 U.S. 692, 701 (1981).

230. *Id.* at 702.

231. *Id.* at 702 n.15.

The extent to which a detention may be utilized to pursue collateral evidence-gathering objectives beyond the authority conferred by *Terry* and its progeny—the authority to make a "brief stop . . . in order to determine [the suspect's] identity or to maintain the status quo momentarily while obtaining more information"[232]—is well described in numerous lower court decisions.[233] While judicial agreement is less than complete, a clear consensus apparently exists that some evidence-gathering objectives may be pursued under the authority of *Terry* and its progeny beyond brief questioning and a frisk. For example, courts have sustained detentions for relatively short periods while computer checks are run to determine whether there are any outstanding warrants for the suspect's arrest.[234] Detentions for relatively short periods have been permitted to facilitate eyewitness identifications.[235] Finally, courts have approved detention of a suspect and his possessions so that a drug detecting dog could be brought to the area.[236] These cases appear to have accepted the thesis developed by Professor LaFave that a *Terry* seizure will not cease to be a limited intrusion simply because collateral evidence-gathering objectives are employed, provided that the "police are diligently pursuing a means of investigation which is likely to resolve the matter one way or another very soon" and that it is "essential to the investigation that the suspect's presence be continued during that interval."[237]

While Professor LaFave's thesis has gained widespread acceptance,[238] it is difficult to articulate justifications for his position without resorting to the relatively short length of the detention in the cases that have used the test to support the activities of the police, or without resorting to the limited nature of the spatial characteristics of the detention (*i.e.*, on-the-scene detention unlike the station house interrogation condemned by *Dunaway*). The distinction between the activity condemned by *Dunaway* and, for example, the practice of detaining a suspect on the street while an eyewitness is brought to the scene could be justified because the former (custodial interrogation) concerns an independent constitutional interest while the latter (eyewitness identification) does not. While an individual has an independent constitutional right to remain silent,[239] he or she does not have a corresponding independent constitutional right to prevent a witness from viewing his or her face or likeness.[240]

232. Adams v. Williams, 407 U.S. 143, 146 (1972).

233. *See infra* cases cited in notes 234–36.

234. *See, e.g.*, United States v. Richards, 500 F.2d 1025, 1029 (9th Cir. 1974), *cert. denied*, 420 U.S. 924 (1975) (suspects held for more than one hour while computer check run to determine whether airplane was stolen); People v. Higbee, 37 Cal. App. 3d 944, 949, 112 Cal. Rptr. 690, 692 (1974); State v. Bell, 382 So. 2d 119, 120 (Fla. Dist. Ct. App. 1980); Clark v. State, 171 Ind. App. 658, 663, 358 N.E.2d 761, 764 (Ind. Ct. App. 1977).

235. *See, e.g.*, United States v. Short, 570 F.2d 1051, 1054 (D.C. Cir. 1978); United States v. Wylie, 569 F.2d 62, 71 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 944 (1978); People v. Harris, 15 Cal. 3d 384, 390–91, 540 P.2d 632, 635–36, 124 Cal. Rptr. 536, 540–41 (1975). In *Harris*, however, the court held the detention for purposes of identification unlawful under the circumstances. *Id.* at 392, 540 P.2d at 637, 124 Cal. Rptr. at 542.

236. *See, e.g.*, United States v. Patino, 649 F.2d 724 (9th Cir. 1981); United States v. Klein, 626 F.2d 22 (7th Cir. 1980); United States v. West, 495 F. Supp. 871 (D. Mass. 1980).

237. LAFAVE, SEARCH, *supra* note 53, § 9.2(f), at 40. *See supra* text accompanying note 212.

238. *See supra* text accompanying notes 234–36.

239. Miranda v. Arizona, 384 U.S. 436, 443–44 (1966).

240. United States v. Wade, 388 U.S. 218, 221–23 (1967).

Nor, for that matter, does an individual have a constitutional right to prevent police from disclosing an outstanding arrest warrant or to prohibit drug detecting dogs from sniffing for contraband.[241] Thus, a distinction exists between such cases on grounds other than the temporal and spatial circumstances of the detention. One reasonably can ask, however, whether the distinction is relevant to the primary issue: whether the detention is one that, considering the intrusion on fourth amendment rights, should be permitted on less than probable cause.

This Article suggests that the fourth amendment right to be free from unreasonable seizures—the right to control one's own movement—includes the right to avoid face-to-face confrontations with law enforcement officials except when the confrontation is supported by sufficient justifications.[242] It is not necessary to say that one has a constitutional right to hide from the police; it is sufficient to say that no government right exists to demand the physical presence of the accused at any given time or at any given place, except upon a showing of sufficient justification. The exception to the general rule that sufficient justification means probable cause, first specifically described in *Adams*, was limited to cases containing a brief stop to maintain the "status quo momentarily while obtaining more information."[243] *Summers* clearly established that the authority conferred by *Terry* and its progeny was not limited to the momentary, on-the-street detention accompanied by a frisk for weapons; rather, the authority conferred under *Terry* permits limited detentions in which the intrusion on individual rights is significantly less than that occasioned by an arrest.[244] The Court in *Summers* authorized the detention of the suspect at his home while a search warrant was executed, since "the type of detention imposed here is not likely to be exploited by the officer . . . because the information the officers seek normally will be obtained through the search and not through the detention."[245] It is quite another matter, however, to authorize a detention upon reasonable suspicion for the specific purpose of obtaining incriminating evidence as a direct result of the detention. The breadth of the potential infringement on constitutional rights flowing from that activity is significantly greater than that which was envisioned by *Terry* and *Adams* and the narrow authority conferred by *Summers*, *Martinez-Fuerte*, and *Mimms*.[246] Qualitatively, little difference exists between sanctioning a street encounter, like that concerned in *Terry*, which becomes the vehicle for investigative techniques other than general

241. United States v. Fulero, 498 F.2d 748 (D.C. Cir. 1974). *But see* People v. Evans, 65 Cal. App. 3d 924, 134 Cal. Rptr. 436 (1977). The right to avoid contact with law enforcement officers is lost, of course, once a person has been arrested with probable cause. The police may monitor the movements of an arrestee as their judgment dictates. Washington v. Chrisman, 102 S. Ct. 812, 817 (1982).

242. The Court has recognized that the general right of privacy includes the right to be let alone. Katz v. United States, 389 U.S. 347, 350 (1967). *See generally* Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

243. *See supra* text accompanying note 183.

244. 452 U.S. 692, 700-01 (1981).

245. *Id.* at 701.

246. *See supra* text accompanying notes 220–24.

questioning, and approving temporary station house investigative detentions any time reasonable suspicion exists that a person has committed a crime and that the individual's presence is needed for evidence-gathering objectives. If the government has the right to require individuals reasonably suspected of criminal activity to appear at the station house for viewing by eyewitnesses or for fingerprinting, or to bring in their possessions for inspection (although probable cause is lacking), the infringement on fourth amendment interests might be less than that occasioned by fortuitous street encounters. At least in some of these cases the public stigma associated with a street encounter could be avoided. The individual could arrange to appear at a convenient time and possibly could challenge the lawfulness of the intrusion before it occurs by seeking to quash or enjoin the process.[247] Unless the Supreme Court restricts the authority conferred under the rationale of *Terry* and *Summers* by limiting the right to exploit the detention for collateral evidence-gathering objectives, it will have come, by indirection, dangerously close to authorization for investigative detentions upon less than probable cause, something that the Supreme Court continuously has refused to authorize when the issue has been confronted directly.[248]

C. *Other Concerns: The Use of Force and the Reasonable Person Focus*

Earlier, in the discussion of the seizure problem, this Article noted that courts have held that neither the subjective intent or belief of the police, nor the subjective belief of the individual concerned, is relevant to the resolution of the problem. Rather, the courts have taken the position that a person has been seized only when, under all the circumstances, a reasonable person would have thought that his or her freedom of movement had been restricted by the activities of law enforcement officials.[249] The nuances of this method of analysis never have been explored fully by the courts, but the use of this test clearly directs the focus of inquiry, at least in some cases, to the perception rather than the fact of a restriction of freedom of movement. In the absence of actual physical restraint on freedom of movement, or of words which clearly indicate that the person is not free to leave, the perception that is generated in the eyes of a reasonable person from the otherwise ambiguous words and conduct of the police will determine whether freedom of movement is restricted. Although the reasonable person standard is the purported test for all cases, in some cases—those in which, for example, physical force is used that impedes freedom of movement—the facts will ordain the outcome and little is achieved by the use of a reasonable person standard. If a person suffers actual physical restraints or is told that he or she is not free to leave, a fortiori that

247. *See In re* Melvin, 546 F.2d 1 (5th Cir. 1977) (granting writ of mandamus to quash order issued by district court at request of United States Attorney that compelled defendant to appear for a lineup); *see also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 170.6, commentary at 487–88 (1975).

248. Davis v. Mississippi, 394 U.S. 721, 727 (1969).

249. *See supra* text accompanying notes 110–14.

person has been seized. In other cases, however, if the acts are ambiguous, the use of a reasonable person standard may be outcome determinative.

The same problem occurs when the question is whether a seizure was a stop or an arrest. Most courts that have considered the problem have held that the question must be resolved by determining how a reasonable person would have viewed the circumstances.[250] Thus, for example, if the officer who participated in the detention subjectively intended to release the individual after a few questions and, perhaps, a frisk, assuming that no additional incriminating facts are revealed, that intent would be irrelevant if the facts otherwise convey the impression—viewed from the eyes of a reasonable person—that the person was under arrest from the outset. Conversely, the detained individual's subjective belief that he or she was under arrest would be irrelevant if the facts, seen through the eyes of a reasonable person, disclosed that the detention was of a limited nature—that is, one which would result in prompt release of the individual following a few brief questions, assuming that no additional incriminating evidence developed.

Examination of the cases discloses, however, that the reasonable person standard, even when specifically accepted as the test (and in many cases no references are made to the question), plays an insignificant role in the outcome of most cases when the issue is whether the person was stopped or arrested. The absence of either a specific reference to the proper method of analysis or evidence that the reasonable person standard played a significant role in the outcome is explained by the judicial conclusion that the objective facts, themselves, ordain the outcome. In other words, if the detention lasted a significant period of time, or if the individual seized was taken to the station house for questioning, these facts—and not a reasonable person's perception of them—will determine the outcome.[251] In cases containing the problem whether a detention constituted a stop or an arrest, more importance seems to be placed on objective facts than in cases in which the problem is whether an encounter between a police officer and citizen constituted a seizure. In the latter category of cases, in which the relevant objective facts generally are lacking, the perception of a reasonable person will control, assuming that the totality of the circumstances otherwise is ambiguous.

In two classes of cases, however, use of the reasonable person standard appears to be important when the problem is whether the detention was a stop or an arrest. One type of case concerns the question of the appropriate weight to be given to the degree of force used to effectuate the encounter. Numerous decisions in the lower federal courts have accepted the premise that the

---

250. *See, e.g.*, United States v. Patterson, 648 F.2d 625, 632 (9th Cir. 1981) (question is whether, under all the circumstances, a reasonable person would conclude that he was under arrest); United States v. Vargas, 633 F.2d 891, 896 (1st Cir. 1980); United States v. Beck, 598 F.2d 497, 500 (9th Cir. 1979).

251. In Dunaway v. New York, 442 U.S. 200 (1979), for example, the Court was concerned with the extent to which the detention exceeded the narrowly circumscribed intrusions that occurred in *Terry* and its progeny and the indistinguishable nature of the detention from that of a traditional arrest. *See generally* United States v. Chamberlin, 644 F.2d 1262, 1265–66 (9th Cir. 1980); United States v. Blum, 614 F.2d 537, 539–40 (6th Cir. 1980).

degree of force is relevant to the question whether the seizure was a stop or an arrest.[252] Initially, it is difficult to understand why the use or display of force should affect the outcome. Both a stop and an arrest are seizures within the meaning of the fourth amendment; by definition, once a person has been seized he or she has no right to leave, and the right to detain the suspect must include the right to enforce that detention by the use of force, if necessary. Therefore, it is difficult to justify the position that the use of force or the degree of force used to effectuate the seizure should, standing alone, constitute an objective circumstance indicating that the person was under arrest, or alternatively, a circumstance that a reasonable person would consider indicative of an arrest. Nonetheless, on occasion some courts have ruled that the use of excessive force, under the circumstances, may transform a stop into an arrest.[253] On the other hand, most courts have held that use of force in making the seizure will not convert what is otherwise a *Terry* stop into an arrest, especially if the use of force occurred under circumstances justifying reasonable fear for the safety of the officers or if it was precipitated by the conduct of the individual seized.[254] Unfortunately, no attempt has been made to explain why consideration of the use of force or the degree of force used should be relevant. One possible justification, but one that never has been specifically proffered by a court, is that a person has been arrested (rather than merely subjected to a *Terry* stop) whenever the intrusiveness of the detention, determined by objective factors such as the length, spatial scope, and other intrusive characteristics of the detention, exceeds the brief stop for general questioning authorized by *Terry* and its progeny, or whenever a reasonable person would think that he or she was under arrest. If the latter standard is utilized as part of the test, then it is possible to accept the premise that the degree of force used to effectuate the seizure is a relevant factor. The use of these considerations means, of course, that a court must be prepared to determine at what point a reasonable person would view the degree of force used as

252. United States v. White, 648 F.2d 29, 34–35 (D.C. Cir. 1981) ("Courts have generally upheld stops made at gunpoint when the threat of force has been viewed as reasonably necessary for the protection of the officer."). *See also* United States v. Bull, 565 F.2d 869 (4th Cir. 1977), *cert. denied*, 435 U.S. 946 (1978); United States v. Worthington, 544 F.2d 1275 (5th Cir.), *cert. denied*, 434 U.S. 817 (1977); United States v. Diggs, 522 F.2d 1310 (D.C. Cir. 1975), *cert. denied sub nom.* Floyd v. United States, 429 U.S. 852 (1976); United States v. Maslanka, 501 F.2d 208 (5th Cir. 1974), *cert. denied sub nom.* Knight v. United States, 421 U.S. 912 (1975).

253. United States v. Strickler, 490 F.2d 378 (9th Cir. 1974) (encircling a suspect's car and ordering him out at gunpoint held an arrest). The court in *Strickler* stated:

> [W]e simply cannot equate an armed approach to a surrounded vehicle whose occupants have been commanded to raise their hands with the "brief stop of a suspicious individual in order to determine his identity or to maintain the status quo momentarily while obtaining more information" which was authorized in *Williams*.

Id. at 380. *See also* United States v. Ramos-Zaragosa, 516 F.2d 141, 144 (9th Cir. 1975); United States v. Lampkin, 464 F.2d 1093, 1095 (3d Cir. 1972).

An interesting variation on the relevance of the use of display of arms is the problem presented by the use of other techniques designed to immobilize the suspect, such as handcuffing. *Compare* United States v. Purry, 545 F.2d 217, 220 (D.C. Cir. 1976) (handcuffing the suspect did not convert detention into arrest), *with* People v. Tebedo, 81 Mich. App. 535, 539, 265 N.W.2d 406, 408 (1978) (handcuffing not permited under authority to stop).

254. United States v. Patterson, 648 F.2d 625, 633 (9th Cir. 1981).

greater than that ordinarily or necessarily associated with a police officer's request to stop and answer a few questions.

Another class of cases in which the decision to employ the reasonable person standard may affect the outcome is that category of cases in which the officer initiating the encounter subjectively intended to arrest and affirmatively indicated that the person was under arrest[255] or, alternatively, gave the *Miranda* warnings prior to questioning.[256] An appropriate use of the reasonable person standard would be to hold that the officer's subjective intent to arrest is not outcome determinative if that subjective intent was not conveyed to the person detained and if the circumstances of the detention otherwise were indicative of a stop.[257] On the other hand, if the officer told the person that he or she was under arrest or gave the suspect the *Miranda* warnings, use of the reasonable person test would require a finding that the person was arrested even though the intrusiveness of the detention did not exceed that of a *Terry* stop. Several courts, however, by what would appear to be clearly erroneous reasoning, have held that since the subjective intent or belief of the officer is not controlling, a finding that the seizure was a stop will not be foreclosed even if the officer told the person that he or she was under arrest provided that the other objective circumstances of the seizure are consistent with a *Terry* stop.[258]

IV. Summary and Conclusion

Providing definite standards for defining the dimensions of the concept of seizure and for distinguishing between stops and arrests will require further judicial attention. While the essential components of these concepts have been developed, the Supreme Court has yet to provide standards that will produce consistent and logical treatment of the issues in the lower courts and workable guidelines for law enforcement officials.

The complexity of the problems is exacerbated by the richness in diversity of confrontations between citizens and law enforcement officials. The nuances of activities and words used by law enforcement officials effectuating an encounter with a citizen are infinite in their variety. The tests that are promulgated must be both specific and flexible at the same time since the nature of encounters may change rapidly, and what may have commenced as a voluntary encounter may escalate quickly into a full-scale arrest, although the police may not have formalized the result by indicating that the person was under arrest.

---

255. People v. Baker, 12 Cal. App. 3d 152, 90 Cal. Rptr. 508 (1970); People v. Stevens, 183 Colo. 399, 517 P.2d 1336 (1973), *rev'd on habeas corpus appeal sub nom.* Stevens v. Wilson, 534 F.2d 867 (10th Cir. 1976); State v. Walton, 159 N.J. Super. 408, 388 A.2d 268 (Super. Ct. App. Div. 1978).

256. *Cf.* United States v. Lara, 638 F.2d 892, 898 n.10 (5th Cir. 1981). At the very minimum, the giving of the *Miranda* warning should constitute persuasive evidence that a seizure occurred, given the public's association of the warning with arrest.

257. United States v. Vargas, 633 F.2d 891, 896 (1st Cir. 1980).

258. *See supra* cases cited at note 255.

Beyond the inherent value of providing definite standards, further judicial attention to these problems is warranted because the Supreme Court has yet to articulate fully the values implicated by the fourth amendment limitations on seizures of people. This Article has advanced the argument that the concept of seizure, including variations in the form of a stop and an arrest, involves considerations other than the mere restriction of freedom of movement. The right of a citizen to unrestricted freedom of movement surely includes the right to avoid contact with law enforcement officials at will (except when the contact is supported by the constitutionally mandated justification) when the contact will serve as an essential link in the development of evidence. Because a police-citizen encounter normally entails an intrusion on personal privacy beyond that of a simple restriction of freedom of movement, that intrusion must be a relevant consideration in determining whether a seizure occurred. To ignore intrusions other than a direct restriction of freedom of movement invites, by indirection, the legitimization of investigative detentions on less than probable cause, which, heretofore, has been rejected.